FILED
FEB 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1324

ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS, INC., ET AL.,
Petitioners,

v.

ALAN ALTSHULER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JAMES J. O'LEARY, ESQ.
JOSEPH P. ROONEY, ESQ.
MICHAEL G. TRACY, ESQ.
JOHN F. COONEY, ESQ.
82 Devonshire Street
Boston, Massachusetts 02109
ANSEL B. CHAPLIN, ESQ.
24 Federal Street
Boston, Massachusetts 02110
Attorneys for Petitioners

Of Counsel:
GASTON, SNOW, MOTLEY & HOLT
JAMES E. FLYNN, JR., ESQ.

PRESS OF GEORGE H. DEAN CO., BOSTON

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. Prior Proceedings	4
B. The State Section 1B Program	6
C. The Federal Affirmative Action Program	7
D. Opinions Below	9
REASONS FOR GRANTING THE WRIT	
The Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled By This Court.	10
A. Section 1B, by requiring contractors to engage in reverse racial discrimination in hiring, violates the Equal Protection clause and raises, according to the Court of Appeals, a "difficult issue, the implications of which stretch far beyond this particular dispute."	10
B. Section 1B, which requires minimum minority hiring quotas on federally assisted construction projects, raises an important issue under the Supremacy clause by undercutting the existing nationwide federal affirmative action program for the construction industry.	17
CONCLUSION	21
APPENDIX	
District Court Opinion	A-1
Appendix to District Court Opinion (Section 1B)	A-33
Court of Appeals Opinion	B-1
Court of Appeals Judgment	B-23
Affidavit of William J. Kacvinsky	C-1
Position Paper	D-1

TABLE OF AUTHORITIES

Cases

PAGE

Carter v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) 16

City of Detroit v. *Brennan*, Civil No. 73-2189 (D.D.C., filed Dec. 18, 1973) 14

City of New York v. *Diamond*, Civil No. 73-5293 (S.D.N.Y., filed Dec. 13, 1973) 14

DeFunis v. *Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted*, 42 U.S.L.W. 3306 (U.S. Nov. 12, 1973) 14, 16

Dobbins v. *Local 212, Elec. Wkrs.*, 292 F. Supp. 413 (S.D. Ohio 1968) 13

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 15

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 18

Mancari v. *Morton*, 5 CCH Fair Empl. Prac. Cases 1321 (D.N.M. 1973), *prob. juris. noted*, 42 U.S.L.W. 3405 (U.S. Jan. 14, 1974) 14, 15, 16

Percy v. *Brennan*, Civil No. 73-4279 (S.D.N.Y., filed Oct. 1, 1973) 14

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 15

Southern Illinois Builders Ass'n v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) 16

United States v. *Elec. Wkrs., Local 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 493 (1970) 16

United States v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) 16

United States v. *Lathers Local 46*, 328 F. Supp. 429 (S.D.N.Y. 1971), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) 16

CONSTITUTION, STATUTES AND REGULATIONS

	PAGE
U. S. Const. Art. VI	2, 3
U. S. Const. Amend. XIV, §1	2, 3
28 U. S. C. §1254(1)	2
28 U. S. C. §1331(a)	4
28 U. S. C. §§1343(3), (4)	4
28 U. S. C. §§2201-02	4
Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*	15
Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), *as amended*, 32 Fed. Reg. 14303 (1967)	7
41 C.F.R. §60-1.4, *as amended*, 39 Fed. Reg. 2365 (1974)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS, INC., ET AL.,
Petitioners,

v.

ALAN ALTSHULER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Associated General Contractors of Massachusetts, Inc., and thirteen general construction companies, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered November 30, 1973 in this declaratory judgment proceeding.

Opinions Below

The opinion of the Court of Appeals is not yet officially reported but appears in Appendix B. The opinion of the

United States District Court for the District of Massachusetts is reported at 361 F. Supp. 1293 and appears in Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on November 30, 1973. (Appendix B-23). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the Commonwealth of Massachusetts violate the Equal Protection clause of the Fourteenth Amendment to the United States Constitution by requiring contractors on federally assisted state construction projects to meet minimum racial quotas in every trade category for hiring workers on each project whether or not the minority workers are qualified in those trades, even though the contractors themselves have never been shown to have practiced racial discrimination, and in the face of an established federal equal employment opportunity program?

2. Does the Commonwealth of Massachusetts violate the Supremacy clause of Article VI of the United States Constitution by imposing ancillary bid conditions, requiring contractors on federally assisted state construction projects to meet minimum hiring quotas for racial minorities, which undercut the established and comprehensive federal program for ensuring job training and equal employment opportunity on an industry-wide basis?

3. Does the Commonwealth of Massachusetts violate the Due Process clause of the Fourteenth Amendment to the United States Constitution by enforcing bid conditions in federally assisted state construction contracts which require

imposition of serious sanctions upon a determination that the contractor has failed to carry its burden of proving that it used "every possible measure" to meet the quota fixed by the bid conditions for minority workers in every trade category on the project?

Constitutional Provisions Involved

United States Constitution, Article VI:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

Petitioners, who were the plaintiffs below, are the Associated General Contractors of Massachusetts, Inc. and thirteen Massachusetts-based general construction contracting companies.[1] They commenced this action on November 7, 1972 by filing a verified complaint which sought a declaration of rights (and related injunctive relief) under 28 U.S.C. §§2201-02 with respect to Section 1B of a contract being let by the Commonwealth of Massachusetts for the construction of the Boston State College classroom, library, auditorium and cafeteria building (the "Boston State contract").[2] Subject matter jurisdiction was conferred on the District Court by 28 U.S.C. §§1331(a) and 1343(3), (4).

The complaint challenges the constitutionality of provisions in Section 1B requiring that the work force for the Boston State contract always contain "not less than twenty percent" minority workers in each of the various construc-

---

[1] E. C. Blanchard Co., Inc.; Conti and Donahue, Inc.; James Farina Corporation; Franchi Construction Co., Inc.; Granger Bros., Inc.; Loranger Construction Corporation; F. W. Madigan Company, Inc.; Gerald E. McNally Construction Co., Inc.; Northgate Construction Co., Inc.; Park Construction Co., Inc.; Vappi & Co., Inc.; S. Volpe & Co., Inc.; and Westcott Construction Corporation.

[2] Named as defendants were Alan Altshuler in his capacity as Secretary of the Executive Office of Transportation and Construction of the Commonwealth of Massachusetts, and Walter J. Poitrast in his capacity as Director of the Bureau of Building Construction within that Office. The United Community Construction Workers, Inc., a labor organization representing minority construction workers, and Michael Williams, a member of the UCCW and an unemployed sheet rock worker, were subsequently allowed to intervene in the action as defendants.

tion trades needed for the project. (A-34). Since the Boston State contract is federally assisted, it also includes bid conditions binding the contractor to comply with existing *federal* standards for minority hiring based upon the traditional concept of equal employment opportunity for every qualified applicant. (A-9, 12; B-3). In the Boston area these federal standards are implemented by the "Boston Plan", a federally funded program for training and placing more minority workers in the construction trades. (B-3).

Plaintiffs assert that Section 1B violates the Equal Protection clause by imposing fixed racial hiring quotas on particular construction projects in an attempt to correct alleged industry-wide racial imbalance. They further charge that a violation of the Supremacy clause results from the conflict between Section 1B and the comprehensive, established federal equal opportunity program for increasing minority hiring on an industry-wide basis in the Boston area. The complaint also claims that Section 1B violates the Due Process clause by authorizing the imposition of major sanctions upon the contractor after a determination that it has not used "every possible measure" to meet the fixed racial quotas.[3]

The District Court held Section 1B constitutional "in all aspects". (A-32). The Court of Appeals affirmed while emphasizing that the case presented "fundamental" issues of first impression and that the equal protection challenge in particular was a "difficult issue, the implications of which stretch far beyond this particular dispute." (B-12, 15).

---

[3] The complaint also contained two claims based upon alleged violations of state law. No review is sought as to the determination of those issues.

B. The State Section 1B Program

Section 1B is an unprecedented attempt to create a racially balanced construction work force on a job-site-by-job-site basis, applying not only to the Boston State contract but to future public construction projects as well.[4] Under Massachusetts public contracting procedures,[5] those bidding on the Boston State contract committed themselves to a quota system whereby not less than twenty percent of all employee man hours in *each* job category would be performed by minority workers — Orientals, Blacks, Puerto Ricans, and North American Indians. (A-33-34). There is, however, no express requirement in Section 1B that any minority worker hired to meet these quotas be qualified to do the work.

Section 1B also requires the contractor to follow special multiple referral procedures outside the traditional union referral methods. (A-35). The contractor must recognize and work with a so-called liaison committee regarding all matters relating to minority recruitment, referral, employ-

---

[4] The problems raised by Section 1B will continue long after this particular contract is completed. Prior to the publication of the bid specifications for the Boston State contract, including Section 1B, defendant Altshuler issued a so-called "Position Paper" which states that he intends to require the inclusion of Section 1B clauses in all future public construction contracts in other urban areas of the Commonwealth alleged to contain substantial minority residential concentrations. (D-4). The Court of Appeals proceeded on the assumption that defendants would continue to apply Section 1B until such time as the construction trades whose work jurisdictions included the City of Boston were racially balanced. (B-16 n.16).

[5] In soliciting bids for the Boston State contract, defendants included Section 1B as an integral part of the bid specifications. (A-7). The bidding procedure in Massachusetts is such that by submission of a bid, each bidder is deemed to have agreed to comply with the bid specifications in the event his bid is accepted and he is awarded the contract. (A-7). Each of the plaintiff contractors was a prospective bidder for the Boston State contract which was awarded to plaintiff Franchi Construction Co., Inc., the low bidder, in January of 1973. (B-2).

ment and training; it must make periodic reports to both the liaison committee and the Massachusetts Commission Against Discrimination; and it must permit MCAD access to its books, records, accounts and other sources of information in connection with the employment of personnel. (A-35-36).

Section 1B also imposes upon the contractor the burden of proving that it has taken "every possible measure to achieve compliance" with the quota hiring system. (A-39). Should the work force ever fall below twenty percent minority workers, and should the contractor fail to sustain this burden of proving that compliance was impossible, it could incur substantial sanctions including debarment from bidding on future public contracts for a period of up to three years. (A-39-40).

C. The Federal Affirmative Action Program

Notwithstanding Section 1B, there exists a comprehensive federal program to accelerate the flow of minority workers into the construction trades. It is founded upon Exec. Order No. 11,246, 30 Fed. Reg. 12319 (1965), *as amended*, 32 Fed. Reg. 14303 (1967), which conditions federal grants-in-aid for state construction contracts, such as the Boston State contract, upon state implementation of federal Bid Conditions which must be included in all such federally assisted contracts.

These Bid Conditions translate the general federal policy of equal employment opportunity into specific contractual commitments by bidders. Under these Bid Conditions, there are now some forty-seven federally approved local or "hometown" equal employment opportunity plans in operation nationwide, including twenty-nine with federally

funded training programs. (B-6 n.6). The Boston Area Construction Program (the "Boston Plan") is one such federally approved and funded hometown plan and is currently in effect in the twenty-four cities and towns in the metropolitan Boston area. (A-7 n.5; B-6). That area includes the same communities that will be used for initial Section 1B programs.

The Boston Plan is an area-wide rather than project-by-project approach to increasing the proportion of minority workers in the construction trades. (B-11). The plan recruits minority workers and then affords orientation, remedial education, trade-related training and on-the-job training by experienced instructors to qualify these workers to compete for available jobs. (B-7 n.9).[6]

The Association, the plaintiff contractors, and the construction trade unions participate in the Boston Plan. The contractors have assumed a continuing obligation to hire minority workers as they are referred through the plan. (B-3-4). There is no commitment to hire a certain number of workers at any specific job site.

During its first phase the Boston Plan surpassed its goal by achieving 367 placements. (C-2). As of October 31, 1972, 275 more minority workers had been trained and placed in its second phase, and it was expected that the goal for this phase would either be met or exceeded. (C-2).

---

[6] The U.S. Department of Labor Manpower Administration has allocated $420,235 in federal funds for the operation of the second phase of the Boston Plan for the period January, 1972 through January, 1973. (C-2). The first phase of the plan covered the period October, 1970 through October, 1971, and was financed by a federal appropriation of $583,730. (C-1-2). The Boston Plan will operate for a total of five years with annual appropriations from the federal government. (A-7 n.5).

D. Opinions Below

On the basis of a discrepancy between the minority population of Boston and the number of minority members in certain construction trade unions covering much larger areas of New England, the District Court concluded that there was racial imbalance in the Boston-area construction work force. (A-9). The Court went on to find that the statistics gave rise to an "inference" that the imbalance had been caused by racial discrimination. (A-11).

The Court also found that defendant Altshuler was not satisfied with the Boston Plan and lacked faith in its achieving effective results. (A-7 n.5). The Court, however, made no finding of its own as to the effectiveness of the Boston Plan despite the uncontradicted affidavit of an official of the U.S. Department of Labor Manpower Administration that the Boston Plan is "a successful one fully meeting the expectations of this Office." (C-2). Primarily on the basis of its finding of prior racial discrimination, the District Court rejected plaintiffs' arguments.

The Court of Appeals affirmed despite its recognition that a denial of equal protection rights was potentially inherent in Section 1B's use of racial quotas. The Court concluded, however, that states may impose quotas if there is a "compelling need" to do so. (B-15-16). In this instance, the Court found that such a need existed because of "serious" racial imbalance in the construction trade unions whose work jurisdictions included those areas of the City of Boston with large minority populations. (B-16). The Court conceded "in principle" that a high minority quota, combined with a heavy burden of proof on the contractor to justify failure to meet that quota, will likely result in the

hiring of unqualified minority workers. (B-18). The Court concluded, however, that in this instance the problem was obviated by the small number of minority workers needed for the Boston State project and the opportunity impliedly given the contractor to be heard before sanctions are imposed. (B-18).

REASONS FOR GRANTING THE WRIT

The Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

A. Section 1B, by requiring contractors to engage in reverse racial discrimination in hiring, violates the Equal Protection clause and raises, according to the Court of Appeals, a "difficult issue, the implications of which stretch far beyond this particular dispute."

In an effort to increase the proportion of minority workers employed in the Boston-area construction trades, the Commonwealth of Massachusetts has taken unprecedented state action. It has imposed a sweeping program of reverse racial discrimination in hiring despite the absence of any finding of discrimination by those subject to the program and in the face of a pre-existing federal plan which is already solving the imbalance problem through less drastic means. Chief Judge Coffin, in his opinion for the Court of Appeals, recognized that Section 1B thereby raises issues of fundamental constitutional significance under the Equal Protection clause, issues which make this case one of far-reaching importance:

> This marks the first time, to our knowledge, that a court has been asked to sanction a plan for hiring a specific

> percentage of minority workers that requires an employer to take "every possible measure" to reach the goal on each job site, and places upon him the burden of proving compliance, under threat of serious penalties if that burden is not sustained. . . . The Commonwealth's affirmative action plan forces us to address a fundamental question: are there constitutional limits to the means by which racial criteria may be used to remedy the present effects of past discrimination and achieve equal opportunity in the future? (B-14-15).

The context in which these fundamental, difficult and unprecedented questions arise is of primary importance. Plaintiffs, general contracting firms and their trade association, have no history of engaging in acts of racial discrimination.[7] On the contrary, the plaintiff association has negotiated, and the plaintiff contractors have voluntarily joined in, an affirmative action plan sponsored by the federal government — the Boston Plan — under which contractors have a continuing obligation to hire whatever minority workers may be referred through the plan to any job site. According to a Labor Department official the Boston Plan is "a successful one fully meeting the expectations of this Office." (C-2).

This is a background of cooperative affirmative action in minority hiring, not racial discrimination. Nevertheless, defendant state officials have promulgated bid conditions for federally assisted state construction contracts which require that twenty percent of the work force *in each job category* consist of minority applicants who may not be qualified to do the work.

---

[7] The record contains some statistical evidence which might suggest racial imbalance in the membership of construction trade unions whose work jurisdictions encompass Boston as well as other parts of Massachusetts and New England. Although construction contractors depend on the union hiring halls to refer workers, there is nothing in the record supporting any inference of racial discrimination by the contractors themselves.

The Court of Appeals recognized that only a finding of "compelling need" could justify, under the Fourteenth Amendment, Section 1B's program of reverse racial discrimination. (B-15-16). The circumstances described above — especially industry-wide efforts under the Boston Plan — foreclose any such finding. Furthermore, Section 1B is constitutionally defective because of its procedural unfairness to the contractor and its pressure on him to hire unqualified minority workers.

Since the contractor has the burden of proving that it used "every possible measure" to fill the quotas, it will have to prefer a "possibly qualified" minority applicant over a fully qualified white worker whenever a quota has not been filled: it is always "possible" that the "possibly qualified" worker will prove to be "qualified." Equally important, less-than-fully qualified minority workers will be hired on pragmatic grounds. A contractor faced with the burden of proving that compliance was impossible at the risk of substantial sanctions will conclude that deviation from the quota represents a greater threat to its livelihood than the hiring of workers of dubious competence.[8]

The Court of Appeals conceded that a heavy burden of proof combined with a substantial quota would be likely to

---

[8] Defendants' brief in the First Circuit makes it clear that Section 1B's twenty percent across-the-board minority ratio for each job category can only be met if less-than-fully qualified minority workers (i.e. "trainees") are employed:

> The Assistant Secretary of Transportation and Construction determined that there exists [sic] adequate journeymen, *apprentices, advanced trainees* and *potential trainees* in Boston's minority community to provide 20% of the Boston State project as well as other construction projects anticipated for that area. . . .
>
> We wanted to establish a goal that could be reached based on the current availability of minority journeymen *and trainees*. . . .

Brief for Appellees in the First Circuit at 6, 21-22 (emphasis supplied).

cause a contractor to hire unqualified minority applicants in preference to admittedly qualified whites. (B-18). It doubted that such a result would occur on the Boston State project which requires about thirty minority workers; but in doing so, it ignored the fact that among the trades in which competent minority workers must be found are elevator installers, sheet metal workers, electricians and plumbers.[9]

The Court of Appeals recognized that Section 1B's quota provisions would be unconstitutional without "fair procedures for contractors to make a showing that insufficient qualified minority workers are available." (B-18). But "fair procedures" are *not* available under a program allowing the contractor to escape penalties only by showing that it used "every possible measure to achieve compliance." Plaintiffs have therefore presented to this Court the issue that Section 1B violates the Due Process clause by imposing such an extremely heavy burden of proof.

This burden is so totally unrealistic as to constitute a transparent device to coerce contractors to hire minority workers regardless of ability. It contains an enormous potential for arbitrary and capricious application against particular contractors. For example, bringing skilled minority workers from other parts of the country to Boston might well be "possible." Must the contractor therefore

---

[9] It is not proper to assume that the requisite number of skilled minority workers exist. As the court observed in *Dobbins* v. *Local 212, Elec. Wkrs.*, 292 F. Supp. 413, 445 (S.D. Ohio 1968):

> It is one thing to presume or assume, prima facie-wise or otherwise, that a significant number of a group have the qualifications for schooling or voting, or jury service. It is another thing to assume, prima facie-wise or otherwise, that because a certain number of people exist, be they W[hite] or N[egro], that any significant number of them are lawyers or doctors, or merchants, or chiefs — or to be concrete, are competent plumbers or electricians, or carpenters.

hire elevator installers in Birmingham, or in Los Angeles, or in Denver? Section 1B does not contain any standards to guide the enforcing agency in deciding that it was "impossible" for the contractor to obtain the necessary workers from distant points. The contractor has no rational basis on which to determine in advance what "measures" will satisfy his quota obligation.

It is highly likely that more actions similar to the case at bar will arise in connection with other federally approved hometown plans. At least three actions involving attempts to substitute more extreme state or local affirmative action plans (including quota schemes) for existing federal Bid Conditions have recently been commenced. *City of Detroit* v. *Brennan,* Civil No. 73-2189 (D.D.C., filed Dec. 18, 1973); *City of New York* v. *Diamond,* Civil No. 73-5293 (S.D.N.Y., filed Dec. 13, 1973); *Percy* v. *Brennan,* Civil No. 73-4279 (S.D.N.Y., filed Oct. 1, 1973). A decision by this Court in the present case would provide guidance in an important unsettled area of the law having a wide-reaching impact on the nationwide federal affirmative action program.

Now before this Court are two other cases involving minority preference schemes which raise equal protection questions closely related to those presented by this case. *DeFunis* v. *Odegaard,* 82 Wash. 2d 11, 507 P.2d 1169, *cert. granted,* 42 U.S.L.W. 3306 (U.S. Nov. 12, 1973); *Mancari* v. *Morton,* 5 CCH Fair Empl. Prac. Cases 1321 (D.N.M. 1973), *prob. juris. noted,* 42 U.S.L.W. 3405 (U.S. Jan. 14, 1974).

The issue in *DeFunis* is whether the Equal Protection clause precludes the use of minority quotas for admission to a state-supported law school where the credentials of most of the preferred minority applicants were such that

they would otherwise have been denied admission. *Mancari* involves a statutory preference for employment within the Bureau of Indian Affairs for those having twenty-five percent or more Indian blood. A three-judge court, relying on language in a more recent federal statute (the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*) mandating employment in the competitive civil service without regard to race, color, sex, creed or national origin, held that Congress thereby effectively repealed the earlier enactment providing for an Indian preference. However, the court expressly stated that if it had had to deal with the constitutional issue of equal protection, it would have reached the same result. To this extent, *Mancari* conflicts in principle with the decision in this case.

This Court, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), has already expressed a view of the statute relied on in *Mancari.* This view is equally applicable to the Equal Protection clause and supports the decision in *Mancari:*

> Congress did not intend by Title VII [of the Civil Rights Act of 1964], however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. 401 U.S. at 430-31.

The fixed quota provisions of Section 1B, both in their terms and in their practical application, reject the principle of individual rights for that of group rights in the name of remedying the admittedly lamentable effects of past discrimination. This Court articulated the constitutional premise of individual rights which is implicit in equal protection in *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948):

> The rights created by the first section of the Fourteenth Amendment are by its terms guaranteed to the individual. The rights established are personal rights.

Section 1B is based on the premise that minority workers as a class have an inherent right to a certain level of job participation in areas near their homes. It involves a more egregious deprivation of equal protection than either *DeFunis* or *Mancari*. Prior decisions have given limited judicial approval to minority preferences to correct a history of flagrant racial discrimination, but no court has previously sanctioned anything like Section 1B's sweeping program of racial hiring quotas.[10] These prior decisions make it clear that racial hiring preferences can withstand equal protection scrutiny only to correct a history of flagrant racial discrimination, only as applied to qualified workers, and only within a carefully limited scope under court supervision. Since Section 1B goes far beyond these limits (and does so despite continuing federal efforts to correct racial imbalance), the decision below conflicts with the principles and standards developed by several courts of appeals to evaluate minority hiring preferences. Plaintiffs submit that this Court should now review this important area of the law and establish what the Court of Appeals recognized as a "fundamental" need: "constitutional limits to the means by which racial criteria may be used to remedy the present effects of past discrimination...." (B-15).

---

[10] *See United States* v. *Lathers Local 46*, 328 F. Supp. 429 (S.D.N.Y. 1971), *aff'd*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973) ("passive resistance and inaction" by union held to justify, for a limited time and under court supervision, minority preference for work permits). To similar effect are *United States* v. *Elec. Wkrs., Local 38*, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970) and *United States* v. *Ironworkers Local 86*, 443 F.2d 554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). *See also Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) ("The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified. . . ."); *Southern Ill. Builders Ass'n* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) (intent of plan was "not to require referral employment of minority group individuals in a fixed ratio on any particular job site").

B. Section 1B, which requires minimum minority hiring quotas on federally assisted construction projects, raises an important issue under the Supremacy clause by undercutting the existing nationwide federal affirmative action program for the construction industry.

The Section 1B bid conditions were superimposed on a contract which was already subject to the federal affirmative action requirements of the Boston Plan. Instead of imposing a racial quota for every trade category on each construction site, the Boston Plan promotes minority hiring on an area-wide basis by working through existing union referral systems. It recruits minority workers and gives them orientation, remedial education, trade-related training, on-the-job training by qualified instructors, and job placements.

The Boston Plan is but one of forty-seven such "hometown" affirmative action plans approved by the Labor Department and operating in major urban areas throughout the United States. These plans represent a concerted, comprehensive federal program to accelerate the flow of trained minority workers into the construction trade union structure. All federal construction grants-in-aid are conditioned on compliance by the contractor with the federal affirmative action program.

The broad national scope of the federal program makes this case an important one, and so does the subject matter involved: the long-standing commitment of the United States government to aid minority group workers in qualifying for and obtaining jobs in the construction industry. Since the decision below approves a state-imposed plan which undercuts a vital federal interest, it merits review by this Court.

This Court stated in *Hines* v. *Davidowitz*, 312 U.S. 52, 66-67 (1941), that

> where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

The federal Bid Conditions, and particularly the hometown plans, form such a complete scheme of regulation to promote minority employment in the construction trades. Through the hometown plans the federal scheme is tailored to the needs of each locality while still subject to the overall control of the Labor Department. The importance of this centralized control was recently emphasized by promulgation of an amended regulation governing affirmative action bid conditions in federally assisted construction contracts. 41 C.F.R. §60-1.4, *as amended*, 39 Fed. Reg. 2365 (1974). The regulation codifies existing federal policy and prohibits the superimposition of local minority employment requirements on federally assisted contracts unless approved beforehand by the Labor Department.[11] Such a strong expression of federal interest leaves no room for the operation of Section 1B which was never so approved.

Section 1B is in such actual conflict with the purpose and operation of the Boston Plan that it must give way. The federal program is intended to prepare and assist minority workers to qualify for and obtain employment in the construction trades regardless of race. Section 1B mandates a pre-set minimum level of minority participation in public construction projects without any requirement of worker

[11] At least three cases have recently been brought to challenge this federal policy of exercising control over ancillary local affirmative action programs. *See* p. 14, *supra*. This Court should review the present case to resolve this serious challenge to federal power.

competency. The record below also shows the following areas of direct conflict: (1) fixed racial quotas for each Section 1B project as opposed to area-wide percentage objectives under the federal Bid Conditions; (2) varying objectives for each trade under the federal Bid Conditions as opposed to across-the-board quotas imposed by Section 1B; (3) requirement under the federal program that minority workers be qualified as opposed to the lack of such a requirement in Section 1B; and (4) imposition upon the contractor of the burden of proving that it used "every possible measure" to comply with Section 1B as opposed to the federal provision requiring good-faith efforts to comply and placing the burden of proving lack of good faith upon the contracting agency.

The Boston Plan places the burden of recruiting, training and placing minority workers upon all the participating construction companies and unions in the metropolitan area. Section 1B makes a single contractor solely responsible for achieving a twenty percent minority work force. It does so on the unfounded assumption that minority workers in the highly skilled trades exist in sufficient numbers for the individual contractor to find them without the recruiting and training programs of the Boston Plan. Moreover, even if qualified minority workers can be found for any given job site, once Section 1B is applied to even a few job sites simultaneously, their numbers will be rapidly depleted. As a result, implementation of Section 1B programs will defeat the Boston Plan's objective of placing minority workers *throughout* the metropolitan area. Rather, they will be clustered on a few Section 1B projects.

The Court of Appeals conceded the most fundamental conflict between the two programs:

> Recognizing that union reluctance to admit minorities to apprenticeship programs has been one primary reason

> for the small percentage of minorities in the construction trades, the Boston Plan focusses upon encouraging area-wide minority recruitment into the unions, and therefore does not alter the patterns of contractor reliance upon the unions for referrals. The Commonwealth's § 1B, however, facilitates referrals from sources other than the unions by providing alternative mechanisms for recruiting minority workers. (Footnote omitted). (B-11).

The Court of Appeals took the position that the construction trade unions have been slow to admit racial minorities to membership. (B-4-5). The Boston Plan is designed to require the unions, which supply most of the workers for major construction projects, to accept more minority representation in their ranks. It provides employment for minority workers, but, more importantly, it incorporates them into the institutions which determine the composition of the labor force on future construction projects whether or not funded by the government. Once Section 1B is applied to a number of job sites simultaneously, its immediate demand for large numbers of minority workers will force the contractors to bypass the union referral system and will drastically impair the Boston Plan's paramount objective of introducing minority workers into the construction industry through traditional union affiliations.

Plaintiffs respectfully submit that the Court of Appeals erred when it elected to consider the admitted discrepancies between Section 1B and the Boston Plan on the basis of the impact upon the Boston Plan of the small number of minority workers required by the Boston State contract alone. This case was before that Court upon the Commonwealth's representation that it fully intends to apply Section 1B elsewhere. (D-4). Viewed in that larger context, Section 1B will seriously jeopardize the success of the Boston Plan: minority workers in the Boston area will

be concentrated on a few Section 1B projects; there will be intense competition for the available recruits to the detriment of the Boston Plan; the traditional prerequisite of union membership will be by-passed; and an extremely heavy burden of taking remedial action will be placed upon a few individual contractors whose historic responsibility for the underlying area-wide racial imbalance is either minimal or non-existent.

In such circumstances Section 1B will so impair the operation of the Boston Plan as to render it a nullity. Given the important objectives of the federal plan, this Court should grant review to consider whether Section 1B should be struck down by virtue of the Supremacy clause.

CONCLUSION

For the reasons stated, plaintiffs respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

James J. O'Leary, Esq.
Joseph P. Rooney, Esq.
Michael G. Tracy, Esq.
John F. Cooney, Esq.
82 Devonshire Street
Boston, Massachusetts 02109

Ansel B. Chaplin, Esq.
24 Federal Street
Boston, Massachusetts 02110
Attorneys for Petitioners

Of Counsel:
Gaston, Snow, Motley & Holt
James E. Flynn, Jr., Esq.

February 28, 1974

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ASSOCIATED GENERAL CONTRACTORS
OF MASSACHUSETTS, INC. ET AL.

v.

ALAN ALTSHULER ET AL.

CIVIL ACTION No. 72-3410-F

OPINION
May 31, 1973

FREEDMAN, D.J.

Introduction:

This matter was commenced before the Court on November 7, 1972 by virtue of plaintiffs' complaint requesting permanent injunctive relief against the defendants from soliciting bids or proposals in connection with the construction of a library, cafeteria, auditorium and classroom for use by Boston State College, or in connection with any other public building construction contract which may include § 1B of the contract drafted by the Commonwealth for the Boston State College project. Plaintiffs also seek a declaration that § 1B of that contract is both unconstitu-

tional and inconsistent with existing Massachusetts law for the following reasons: (1) it imposes on the contractor securing the bid for said contract obligations to have minimum minority manhour quotas without regard to qualifications and other requirements inconsistent with obligations under federal bid conditions and the federal equal employment opportunity clause found in all federally assisted construction programs, and therefore violates the Supremacy Clause in Article VI of the Constitution of the United States;[1] (2) it requires the contractor to hire fixed minimum minority manhour quotas in each job category without regard to qualifications and hence violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, as well as Articles I, X and XII of the Declaration of Rights of the Constitution of Massachusetts; (3) it permits the imposition of sanctions upon the contractor without affording him notice and the opportunity to be heard and/or defend himself with the use of witnesses and making a record for review in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Articles X and XII of the Declaration of Rights of the Constitution of Massachusetts;[2] (4) it vests in the Massachusetts Commission Against Discrimination (hereinafter called MCAD) the power to summons records in connection with the employment practices of the contractors involved, and allows the imposition of sanctions without any specific finding by MCAD of an unlawful practice, and is thus in direct conflict with M.G.L. c.151B and Articles X, XII, and XXX of the Declaration of Rights of the

---

[1] See Appendix A, § 1B-.03.1.

[2] See Appendix A, § 1B-.11 in its entirety, and Appendix B, paragraph B amending § 1B-.11.

Massachusetts Constitution;[3] and (5) it requires bidders to agree to assess a backcharge of 1/10 of 1% of the filed subcontract award price against a noncomplying subcontractor in contravention of the Massachusetts Payments Statute (M.G.L. c.30 § 39F).[4]

The United Community Construction Workers, Inc. (a Massachusetts charitable corporation existing as a labor union representing workers in the construction trades and as an employment referral center for unemployed minority construction trades workers) and one Michael Williams (an unemployed black sheet rock worker and a member of United Community Construction Workers, Inc.) were allowed to intervene as defendants in this case on November 29, 1972. On December 15, 1972, the Court denied plaintiffs' motion for a temporary restraining order, and at the same time, denied defendants' motion to dismiss. It was also acknowledged at this time that the matter before the Court would not proceed further on temporary injunctive relief, but would proceed on the permanent injunction and the substantive legal challenges to § 1B of the Boston State College Contract. On January 5, 1973 plaintiffs' motion for protective order, seeking to prevent the taking of some 23 depositions of various trade union officials in the City of Boston, was denied by the Court. At that time, plaintiffs were given leave to file additional evidentiary materials after defendants' final discovery materials were filed. Plaintiffs' further motion to strike portions of affidavits already filed by the defendants was denied. Defendants' latest affidavits of the 23 various labor unions previously mentioned were ordered filed by January 15, 1973.

---

[3] See Appendix A, § 1B-.11.1, 1B-.11.2 and Appendix B, paragraph B amending § 1B-.11.2.

[4] See Appendix A, § 1B-.11.2(a).

Procedural Posture:

The question was raised during argument as to what procedural posture the Court was taking with regard to determining the issues raised in the case. The parties were unclear whether the case was proceeding under Rule 65(a)(2) of the Federal Rules of Civil Procedure — i.e., by the Court considering an advancement of the trial on the merits and a consolidation with the hearing on the motion of an application for a preliminary injunction, (although it was agreed the application for a preliminary injunction would be bypassed) or whether the case was proceeding under Rule 56 of the Federal Rules of Civil Procedure as a motion for summary judgment (although neither party had ever, in fact, filed a motion for summary judgment). This was clarified by the Court when it asserted that it was proceeding with the case as a civil non-jury case and would consider all evidence submitted for purposes of deciding the controversy as to the legality of § 1B of the Boston State Contract. On February 9, 1973 the plaintiffs and original defendants, Altshuler and Poitrast, filed a written stipulation in which they agreed that both parties had completed all evidence they wished to submit to the Court, that neither sought further opportunity to introduce evidence whether by testimony, deposition or affidavit, and that the case was ripe for the Court to make a determination on the merits. The stipulation was approved by the Court on February 15, 1973. On that day, defendant-intervenors filed a statement with the Court asserting that they had submitted all the evidence they wished to submit against plaintiffs' position and, on the question of law at hand, there was no need for further evidence, and that the case was ripe for judgment at this time.

The parties, therefore, being in basic agreement as to the procedural status of the case, the Court moves along to

consider the issues presented, and for that purpose submits its basic findings of fact and conclusions of law pertaining thereto.

Findings of Fact:

1. Plaintiff, Associate General Contractors of Massachusetts, Inc., is a Massachusetts corporation organized under the provisions of M.G.L. c.180, with its usual place of business in Brookline, Massachusetts (hereinafter called the "Association").

2. Said plaintiff Association is a membership corporation comprised of 145 general contracting firms which together perform approximately eighty (80) percent of all commercial, industrial and public building construction in Massachusetts.

3. Plaintiffs, E. C. Blanchard Co., Conti and Donahue, Inc., James Farina Corporation, Franchi Construction Co., Inc., Granger Bros., Inc., Loranger Construction Corporation, F. W. Madigan Company, Inc., Gerald E. McNally Construction Co., Inc., Northgate Construction Company, Inc., Park Construction Co., Inc., Vappi & Company, Inc., S. Volpe & Co., Inc. and Westcott Construction Corporation (hereinafter called the "Contractors") are Massachusetts corporations, each of which maintains its usual place of business in Massachusetts. All of the plaintiff contractors are members of the plaintiff association.

4. The defendant, Alan Altshuler, is the Secretary of the Executive Office of Transportation and Construction of the Commonwealth of Massachusetts (hereinafter called the "Secretary") and had properly been appointed to such position in compliance with state law (M.G.L. c.6A § 3).

5. The defendant, Walter J. Poitrast, is the Director of the Bureau of Building Construction within the Executive Office of Transportation and Construction of the Commonwealth of Massachusetts (hereinafter called the "Director").

6. The United Community Construction Workers, Inc. is a Massachusetts charitable corporation engaged in the business of a labor union representing minority construction trades workers and acts as an employment referral center for placing unemployed workers in the construction trades (hereinafter called "defendant-intervenors").

7. Michael Williams is an unemployed black sheet rock worker and is a member of the United Community Construction Workers, Inc. (hereinafter also called "defendant-intervenor").

8. One of the defendant Director's duties by state law (M.G.L. c.6A § 24) is to solicit sealed bids ("or proposals") by newspaper advertisements and other means for all public building construction projects in accordance with § 22 of aforementioned Chapter 6A. After the bid solicitation process is completed, the Director with the approval of the Secretary is required to award contracts for said projects to the lowest responsible eligible bidder in accordance with the procedures outlined in said § 24 as well as Chapter 149 §§ 44A to L, inclusive.

9. Besides approving contract awards by the Director, the Secretary is also charged by § 20 of Chapter 6A with the ultimate responsibility of the exercise of all powers and the performance of all duties assigned by law to the Bureau of Building Construction to its Director.

10. On or about October 13, 1972, the Director, pursuant to instructions of the Secretary, caused an advertisement in the Boston Globe and other newspapers inviting contractors to bid in connection with the proposed Boston State College Classroom, Library, Auditorium and Cafeteria Building Contract (hereinafter called "the Boston State Contract") — said authority for seeking bids for said contract properly lying within the provisions of Chapter 6A, § 24.

11. The times originally set forth in said notice for the filing of general bids (November 17, 1972) and sub-bids (November 10, 1972) were later extended by the Director.

12. The prospective construction cost of the Boston State Contract is expected to be in the range of $12,000,000 to $15,000,000.

13. The Secretary and Director included § 1B as an integral part of the bid specifications to the Boston State Contract; so that by submitting a bid, each bidder would be deemed to have agreed to comply with the provisions of § 1B, if he was awarded the Boston State Contract.

14. Section 1B contains provisions allegedly designed to obtain equal employment opportunities for minorities.

15. On May 30, 1972, the Executive Office of Transportation and Construction of Massachusetts issued a position paper as to the history of the Boston Plan, a plan to bring about more minority employment in construction trades, and the effect that the Office's new policy would have on public contracts in the near future.[5]

[5] "Boston Plan I" was an agreement on the part of representatives of construction labor unions, contractors, and minority community representatives, instituting a five-year program for integrating the construction labor force in the Boston area. Projected targets and goals to be reached

16. Each of the plaintiff Contractors are general contractors and historically have been active in the field of construction.

17. Prior to the publication of the advertisement or notice to bid referred to in No. 10, representatives of the Association, including the Contractors, met with the Secretary and his representatives on several occasions to discuss § 1B's draft contract language and took the position at that time that the plaintiffs regarded its provisions as illegal.

18. Following said meetings, the defendants caused bid specifications to be issued for the Boston State Contract which contained § 1B's language as identical in relevant respects to the draft contract language mentioned in the position paper. [See No. 15.]

19. Section 1B contains a severability clause, added to the contract by Addendum No. 2, dated November 15, 1972. [See Appendix B.]

20. Plaintiff Contractors are currently performing one hundred, fifty-five million dollars ($155,000,000) worth of public building contracts in Massachusetts within M.G.L.

---

were established. The U.S. Department of Labor funded the plan. Apparently, the plan was not progressing satisfactorily, and the Department of Labor withheld second-year funding until a revised plan was negotiated. The new plan, "Boston Plan II", commenced operation in January 1972, and has been endorsed and funded by the U.S. Department of Labor. The plan involves only two parties — the contractor and the labor unions. There was no participation in Boston Plan II by state or local public officials or by minority community representatives.

Apparently, the Commonwealth's Office of Transportation and Construction was not satisfied with Boston Plan II and did not have a great deal of faith in its achieving effective results. In its position paper of May 30, 1972, it delineated its new policy, much of which is embodied in § 1B of the Boston State Contract. Boston Plan II is still in effect.

c.6A § 22, and in the past have performed billions of dollars worth of such contracts.

21. The federal equal employment clause is a mandatory provision in all federally assisted construction contracts.

22. Besides the federal equal employment clause, the Secretary of Labor of the United States Department of Labor (hereinafter called "the Secretary of Labor"), pursuant to § 201 of Executive Order No. 11246 (30 F.R. 12319), as amended, and 41 C.F.R. 60, has promulgated so-called Bid Conditions to be included in all bid documents for federally assisted construction contracts.

23. The aforementioned federal equal employment opportunity clause and Bid Conditions set forth affirmative action and equal employment opportunity requirements designed to bring about increased minority employment in federally assisted construction contracts. In order to be considered a responsive bidder and with both the federal equal employment opportunity clause and the Bid Conditions as promulgated by the Secretary of Labor.

24. The Boston State Contract originally has been regarded as a federally assisted construction contract and therefore is subject to the aforementioned federal equal employment clause and Bid Conditions. Such clause and conditions do appear in the bid specifications for the Boston State Contract.

25. Based on information revealed in the depositions of several union officials, and on other statistical evidence available, the Court concludes that racial imbalance does exist in the Boston Construction Trades and such imbalance is the result of past discriminatory practices on the part of

many entities of that industry. The "Equal Employment Opportunity Local Union Report EEO-2" forms are most instructive. These forms must be filed annually with the federal government by any local union whose membership exceeds one hundred. The union is required to provide statistical information comparing the number of minority group members, referrals, and applicants, with the total numbers in each of those categories. The Court has studied EEO-2 forms for the years 1968-72 filed by several construction trade unions servicing the City of Boston and has found that the vast majority of the unions have been and remain racially imbalanced.[6]

In 1968 the statistics show that twelve unions had a minority membership of approximately 3-4% or less, and three had minority memberships of 5%, 9%, and 15%, respectively. In 1969 thirteen unions reported a minority membership of 3-4% or less, two reported 5%, two reported 10%, and two laborers' unions reported 15% and 18%, respectively. The situation continues in 1970 and 1971 with similar statistics, showing only slight change by 1972 when the total minority membership of 21 unions was approximately 7%. It should be noted that this figure would be significantly lower but for the relatively high minority percentage figures of two laborers' unions.

Boston has a sizable minority population. According to data compiled from 1970 census figures, the total minority population may exceed 23%. In the Roxbury section of Boston the minority population exceeds 60%. It should be obvious to anyone who looks at them, that a comparison of

[6] It should be noted that many of these unions serve areas well outside the City of Boston, including areas in other New England states. The total membership figures and separate minority membership figures include these outside areas, many of which admittedly may not have a sizable minority population.

the union membership statistics and the census population statistics, clearly supports a finding of racial imbalance in the trade unions servicing the Boston area. More importantly, however, this Court adopts the previously established practice of accepting such statistics as sufficient evidence to support an inference of racial discrimination and holds that such inference has not been overcome by any contrary evidence. See *Carter* v. *Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 247 (10th Cir. 1970); *Turner* v. *Fouche*, 396 U.S. 346, 360 (1970).

The fact that the statistics are based on union membership figures does not prohibit their application to the construction trades as a whole. It is commonly known (and supported by affidavits in this case) that the majority of construction companies get their workers through union hall referrals. As a result, the companies become instrumental in the perpetuation of a racially discriminatory system of hiring in that industry. Plaintiffs here may argue that there is no evidence to prove that the individual construction companies named as plaintiffs use this method to get workers. No matter. Affirmative action plans, including a provision such as § 1B, are not designed to punish previous wrongdoers. They seek to exact a "covenant for present performance" which will hopefully have the effect of abolishing the results of past discriminations in the construction industry regardless of who was at fault in the past. See *Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159, 176 (3rd Cir. 1971).

26. The Commonwealth of Massachusetts attempted to divest itself of receiving any federal funds for the Boston State Contract, but the federal government declined to

agree to such a request pending the results of this litigation. Therefore, the Boston State Contract continues to be regarded as a federally assisted construction contract.

From these findings of fact, the Court proceeds to examine the legal questions raised in plaintiffs' complaint and makes its conclusions of law as to whether § 1B is constitutional or not on its face and, as a result, can or cannot be validly enforced.

Conclusions of Law:

I VIOLATION OF SUPREMACY CLAUSE

Plaintiffs allege that § 1B violates Article VI of the United States Constitution (Supremacy Clause). They argue that, when compared with the federal provisions authorized by Executive Order No. 11246, as amended by Order No. 11375, the § 1B contractual commitments conflict with the federal provisions and require bidders to agree to requirements not included in the federal provisions.

In order to reach its determination of this issue, the Court reviews the leading cases of *Hines* v. *Davidowitz*, 312 U.S. 52 (1940), and *Perez* v. *Campbell*, 402 U.S. 637 (1971). In *Hines*, the Court was confronted with an alleged conflict between the Pennsylvania Alien Registration Act of 1939 and The Federal Alien Registration Act of 1940. The Court ultimately held that the federal act formed a comprehensive, integrated scheme for the regulation of aliens and precluded the enforcement of state alien registration acts such as that adopted by Pennsylvania. In so holding, the Court had to make a determination of "whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (at p. 67).

This language is instructive in two respects. *First,* the Court uses the language "in this particular case" indicating these matters must be decided on a case by case basis. [The Court makes this clearer at p. 67 by stating, "There is not . . . any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress."] *Second,* it indicates there must be an inquiry into Congressional purpose and objective and a comparison with the state law purpose and objective. In making such a comparison in *Hines,* Justice Black stated at pp. 66-67, ". . . where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, *or enforce additional or auxiliary regulations.*" [Emphasis added.] At first blush, this is strong, confining language. However, — "inconsistently with the purpose of Congress" — seems to be somewhat of a qualifying phrase indicating that in some cases where the state and federal purpose are the same, certain inconsistencies between state and federal law will not necessarily render the state law invalid. It should be noted that *Hines* offers no absolute test. The Court states at p. 67 that there is no "infallible constitutional test or an exclusive constitutional yardstick."

Perez interpreted *Hines* as establishing a controlling principle that "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause" (p. 652). In *Perez,* the Court was deciding whether a state statute protecting judgment creditors from "financially irresponsible persons" was in conflict with a federal statute that gave discharged debtors a new start "unhampered by the pressure and discouragement of pre-existing debt." The Court noted initially that its ultimate

determination would be the result of a two-step process of first ascertaining the purpose of the two statutes and secondly determining whether they do in fact conflict. *Perez* is clearly looking to *Hines* as a controlling case which establishes the "controlling principles" and points out the "primary functions of the Court in Supremacy cases." There is a third step in the process, however. After establishing the "purposes" of the state and federal laws respectively and after determining whether such purposes are in conflict, it must also be determined whether the federal authority intended to make its jurisdiction exclusive — i.e., whether it has "pre-empted" the field. [See *California* v. *Zook*, 336 U.S. 725 at 731 (1949).]

In examining the facts of the case at bar, the Court finds that Executive Order No. 11246, 30 F.R. 12319 (Sept. 28, 1965), provides for the inclusion in government contracts of provisions aimed at preventing discrimination by government contractors. It is clearly stated in Order No. 11246 that the policy of the federal government is to provide equal job opportunity in all federal employment or federally funded projects, for all qualified persons, and to prohibit discrimination in employment because of race, creed, color or national origin, and to promote the realization of equal employment opportunity through a positive, continuing program. Order No. 11246 "carries forward" such a program. [See Executive Order No. 11375, 32 F.R. 14303 (Oct. 17, 1967), extending 11246 to prohibit sex discrimination.]

In the Governor's Code of Fair Practices, Executive Order No. 74, Governor Sargent declared in Article I that:

> "Non-discrimination and equal employment opportunity are the policy of the Executive Department of the Commonwealth of Massachusetts in all of its decisions, programs and activities. To that end, all state employees

> shall rigorously take affirmative action steps to insure equality of opportunity in the internal affairs of state government, as well as in their relations with the public, including those persons and organizations doing business with the Commonwealth."

The Order further states that affirmative action:

> ". . . must also entail positive and aggressive measures to insure equal opportunity in the areas of hiring, promotion, demotion or transfer, recruitment, layoff or termination, rate of compensation, and inservice apprenticeship training programs."

As in the Federal Executive Order, the Governor's Order makes provision for anti-discrimination clauses in state contracts for public buildings, etc. The Secretary of the Executive Office of Transportation and Construction (defendant Altshuler) has determined that § 1B is a proper contract clause, authorized by the Governor's Order, to "carry forward" the policy of that order, and has included and will include it in all future public building construction contracts in urban areas containing substantial minority residential concentrations.

Upon examination, it seems quite clear to this Court that the purpose of § 1B, in light of the Governor's Order, and the purpose of the provisions of Executive Order No. 11246, in light of the policy of the federal government, are the same: that is, to require equal opportunity in hiring, etc. on state and federally supported projects, respectively. They cannot be said to be in conflict with one another, at least to the extent that the policy and purpose are the same.

The Supreme Court has reached the same conclusion in a similar case. In *Colorado Anti-Discrimination Commission et al.* v. *Continental Air Lines, Inc.*, 372 U.S. 714 (1963), the appellant issued an order against the respondent alleging unfair employment practices under The

Colorado Anti-Discrimination Act of 1957. Respondent argued that the state commission should be prevented from taking such action inasmuch as the federal government had pre-empted the field. They asserted that the state action was invalid under the Supremacy Clause. To support this position, respondent argued that the Federal Aviation Act of 1958, The Railway Labor Act, and certain executive orders, had pervasively covered the field. By Executive Order No. 10925 of March 6, 1961, President Kennedy established the President's Committee on Equal Employment Opportunity. The Order stated that discrimination based on race, etc. is contrary to constitutional principles and policies of the United States, that it is the obligation of the government to ensure equal opportunity for all qualified persons, and that it is the policy of the executive branch to encourage by positive measures equal opportunity. In carrying out the "positive measures" policy, the Order required certain provisions in government contracts aimed at preventing discrimination by the contractors and encouraging, by positive action, equal opportunity. The Court concluded by stating, at p. 725:

> "Finally, we reject the argument that Colorado's Anti-Discrimination Act cannot constitutionally be enforced because of Executive Orders requiring government contracting agencies to include in their contracts clauses by which contractors agree not to discriminate against employees because of their race, religion, color or national origin."

The Court did not directly address itself to the general question of whether an Executive Order can foreclose state legislation. It did state, however:

> "It is impossible for us to believe that the Executive intended for its orders to regulate air carrier discrimination among employees so pervasively as to preempt state legislation intended to accomplish the same purpose."

The Executive Order involved in *Colorado* had nearly the same relationship to the Colorado statute as Order No. 11246 has to § 1B, and the Supreme Court's analysis and conclusion in that case seem most applicable to the present case.

Having determined that there is no inherent conflict of policy and purpose between § 1B and federal regulations and provisions, it remains to be considered whether or not the federal government has intended to "pre-empt the field" and assume exclusive control over matters of employment discrimination on projects which are partially funded by the federal government. This Court thinks not. The federal provisions included in the Boston State Contract were made pursuant to the directive of alleged conflict between state action and congressional action as would be the case if we were concerned directly with the Civil Rights Act. However, it is important for our purposes to recognize that in enacting the Civil Rights Act (which, among other things, prohibits employment discrimination), Congress expressly stated that it was not their intent to interfere with existing or future state law. [See 42 U.S.C. § 2000e-7, § 2000h-4.] The Court interprets this as evidence of a general federal policy not to interfere with state law which is consistent with federal policy in civil rights matters. This should include Executive Orders as the Supreme Court concluded by inference in *Colorado Anti-Discrimination et al.* v. *Continental Air Lines, Inc., supra.*

In *Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971), the constitutionality of Order No. 11246 was unsuccessfully challenged. The Court stated at pp. 171, 172:

"But while Congress has not prohibited Presidential action in the area of fair employment on federal or feder-

ally assisted contracts, the Executive is bound by the express prohibitions of Title VII."

[The Civil Rights Act of 1964]

It is fair to conclude that the Executive is also bound by the express provisions of the Act disclaiming any intent to interfere with state law which is not inconsistent with the policy of the Act. In any event, there is nothing within Order No. 11246 itself or within the history of Executive Orders in general to indicate that the Executive intended its Order to preclude any state action in the same field.

In *Florida Lime & Avocado Growers, Inc., et al.* v. *Paul, Director of the Department of Agriculture of California et al.*, 373 U.S. 132 (1963), the Supreme Court considered the validity of a California statute which conflicted with a federal regulation concerning the marketability of avocadoes. In upholding the California regulation, the Court (at p. 142) applied a test of "whether both regulations can be enforced without impairing the federal superintendence of the field." The Court further stated that ". . . federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." The Court found there was no "inevitable collision" between the California and federal scheme despite the dissimilarity in standards. The California standards were more demanding than the federal. It is not unusual for the Court to allow states to set higher standards than the minimum federal standards. [See p. 144.] In the instant case, provision 1B does not act to impede "federal superintendence" of the field despite the fact that § 1B is more demanding in its affirmative action requirements. All federal requirements may still be met.

In conclusion, this Court finds that § 1B is compatible with the federal executive order, and hence, does not fail because of the Supremacy Clause.

II Unconstitutional Quota

Plaintiffs argue § 1B constitutes a fixed racial quota which violates the Due Process and Equal Protection Clauses of the United States Constitution and Articles I, X, and XII of the Declaration of Rights of the Massachusetts Constitution. The particular section (1B-.03.1) which plaintiffs are challenging requires that the contractor ". . . shall maintain a not less than twenty percent ratio of minority employee manhours to total employee manhours in each job category."

Plaintiffs are correct in asserting that classification by race is something which has traditionally been forbidden by the Constitution. There is a wealth of case law to support such a position. The Constitution protects all races from unfair classification or discrimination on the basis of race — white as well as all others. Indeed, the major objection to most affirmative action employment plans has been that they unlawfully discriminate against whites. Unfortunately, our country's history is replete with examples of racial classification and "quotas." They seem to have been effectively used in the past to promote and maintain policies of racial, religious, and other forms of discrimination, all diabolically insidious to the American dream of equal opportunity. Inequality of citizenship has been the result. It was a long time before there was any official awareness expressed over the drastic effects of unconstitutional discriminatory practices. In the landmark decision of *Brown* v. *Board of Education*, 347 U.S. 483, (1954), the Supreme Court recognized the harmful effects of discrimination on

children forced to attend racially segregated schools. *Brown* seemed to usher in an era of judicial determinations recognizing that the Constitution could not tolerate discrimination of any kind, whether it be intentional or otherwise. Proscribing discriminatory conduct is not enough, however. The more difficult task is to correct the effects of what has been done in the past and see that it does not occur again. Courts have been addressing themselves to these problems recently and there is a rather substantial body of case law to which this Court may look for guidance in making its determination. Many of these cases have allowed, and some have ordered, affirmative action plans which embody preferential treatment for minorities and classification by race. In *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2nd Cir. 1968), at p. 931, the Court stated,

> "What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for that purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required."

The Court is willing to agree with plaintiffs that § 1B requires preferential treatment for minorities and establishes classifications based on race. It may even require a "quota." The term used is not important. What the Court must decide is whether or not such requirements are allowable in the circumstances of this case.

In favor of their position that fixed racial quotas are illegal, even if remedial in character, plaintiffs look to *Mapp* v. *Board of Education,* Oct. 11, 1972, 6th Cir., Nos. 71-2006, 71-2007, 72-1443, 72-1444. The Court of Appeals

there reversed a desegregation plan which provided for a "racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system." The Court characterized the plan as a "fixed racial quota." There seemed to be much concern over the fact that busing would be required to effect the necessary percentages. The *Mapp* Court was forced to acknowledge, however, that while not "commanded" by *Swann* v. *Board of Education,* 402 U.S. 1 (1971), racially fixed quotas were *permitted* in that case. *Swann* was a school desegregation case wherein the Supreme Court approved "the very limited use made of mathematical ratios" as being within the "equitable remedial discretion of the District Court." *Mapp* does not appear to be very helpful.[7] Admittedly, it is difficult to interpret *Swann* in light of *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). In reference to the Civil Rights Act, the *Griggs* Court stated at pp. 430, 431:

> ". . . the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

Of course, neither *Swann* nor the case at bar deal directly with the Civil Rights Act. Nonetheless, it seems that many of the lower courts believe *Swann* tempered *Griggs* somewhat. See *Carter* v. *Gallagher,* 452 F.2d 315 (8th Cir. 1971), on rehearing in 1972, at p. 331; *U.S.* v. *Lathers,* CCA 2d Cir., No. 72-1345 (Jan. 2, 1973).

---

[7] This Court is careful to note the caution of *Swann* on p. 22:

> "It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination."

Lathers was an action brought by the United States under the Civil Rights Act of 1964 to enjoin a pattern and practice of discrimination by a labor union in work referrals. The District Court ordered issuance of 100 work permits immediately to minority applicants. In answer to the contention that such preferential treatment was proscribed by the Act, (42 U.S.C. § 2000(e)(2)(j)) the Circuit Court stated:

> "The only limitation on the broad powers of affirmative relief is that restricting preferential quota hiring. However, *while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not.*" [Emphasis added.]

The Court drew support from a number of cases which had allowed or ordered preferential treatment. See *Joyce* v. *McCrane,* 320 F. Supp. 1284 (D. N.J. 1970). *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971), cert. den. 404 U.S. 984 (1971); *United States* v. *International Bro. of Elec. Wkrs., L. No. 38,* 428 F.2d 144 (6th Cir. 1970); *Local 53 of Int. Ass'n. of Heat & Frost I. & A. Wkrs.* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969); *United States* v. *Central Motor Lines, Inc.,* 325 F. Supp. 478 (W.D. N.C. 1970). Plaintiff may argue *Lathers* and the cases cited therein are distinguishable from this case. The Court would have to agree. They all deal with the Civil Rights Act and alleged violations thereunder. Many of them deal with specific instances of discrimination and grant relief to specific aggrieved parties. None of them require specific hiring ratios on specific job sites but seem to be aimed at industry-wide practices within the communities involved. Despite these differences, one must conclude that in determining whether or not these remedial schemes were allowable under the Civil Rights Act, the Courts must have considered the more basic question of their constitutional-

ity. From the wide use and approval of the various plans, some of which included ratio hiring, etc., the inference must be drawn that the courts felt they passed constitutional muster.

The Court need not rely only on the bare inference of constitutionality the Civil Rights Act cases raise, however. There are a number of cases which have dealt more specifically with the constitutionality of various affirmative action plans. In *Contractors Ass'n. of Eastern Pa.* v. *Secretary of Labor, supra,* the Third Circuit almost summarily dismissed the argument that the "Philadelphia Plan" required "racial quotas" prohibited by the equal protection aspect of the Fifth Amendment. At 442 F.2d 177, the Court stated:

> "The Philadelphia Plan is valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. The Fifth Amendment does not prohibit such action."[8]

Certainly a holding that such a plan does not violate equal protection is instructive for our purposes even though it was a Fifth Amendment question involved.

In *Southern Illinois Builders Association* v. *Ogilvie,* 327 F. Supp. 1154 (S.D.Ill. 1971), the Court approved a plan designed to remedy the effects of discrimination on highway construction projects in two Illinois counties. The Court determined that under-representation of minorities

[8] The "Philadelphia Plan" related to minority hiring on federally assisted construction projects in a 5-county area and included as a precondition to federal assistance the bidders' submission of an affirmative program enlisting goals within the range specified for minority hiring. No bidder would be awarded a contract unless his affirmative action program included goals falling within the established range.

on the projects was the result of the fact that equal employment opportunities in construction unions did not exist for the minority groups in this two-county area. Most contractors obtained their workers from union referrals. The "Ogilvie Plan" basically provided for the recruitment, training and placement of minority group residents of the two-county area. The Plan was incorporated into all bids for construction and reconstruction of highways in the area involved. In order to be in compliance, the contractors who signed the plan were required to hire trainees at the minimum ratio of one trainee for every four journeymen. Speaking generally, the Court stated at p. 1159:

> ". . . in circumstances where blacks have been discriminated against for years, there is no alternative but to require that certain minorities be taken into consideration with respect to the specific minority percentage of the population in a given area in order to provide a starting point for equal employment opportunities. In this regard, it is the feeling of this Court that minimum ratios, where, *de jure* or *de facto*, based upon race are constitutional and valid when adopted for the purpose of implementing affirmative action to achieve equal employment opportunities."

The Court further stated at p. 1161:

> "The contractors may find themselves in a rather unfortunate position, but unless prohibited by statute the Government has the unrestricted power to determine with whom it will deal and the terms and conditions of its contracts."

This language could apply equally as well in the case at bar. In light of the *Contractors* case (Philadelphia Plan) and others, the Court found "little difficulty in approving the Ogilvie Plan."[9]

---

[9] In an amended order, the Court made it clear that the intent of the plan was to guarantee craft-wide representation in highway construction

The most recent and probably the leading case in this Circuit is *Castro* v. *Beecher,* 459 F.2d 725 (1st Cir. 1972). Plaintiffs in that case, six blacks and two of Spanish descent, claimed violations of the Civil Rights Act, 42 U.S.C. §§ 1981, 1983, in police recruiting and hiring practices in Boston. The District Court found no racial discrimination had occurred, but did hold that the written exam was non-predictive and discriminatory and ordered a new exam be given which would be more job related. In declining to grant preferential hiring for minorities, the District Court stated at 334 F. Supp. 930, 949 (D. Mass. 1972):

> ". . . it is a fallacy to suppose that the Constitution entitles blacks to police selected like jurors as representatives of a cross-section of the community. Blacks have no more a constitutional right to a quota of black policemen than a quota of black judges or legislators, or state-employed teachers. What blacks and other minorities have a right to is that public employees like policemen shall be selected by criteria that are significantly related to a job."

The Circuit Court disagreed in part with the court below and ruled the judge had erred in refusing to recognize the case as one involving racial discrimination and felt the relief ordered by the lower court was ". . . unlikely to increase significantly this level of [minority] representation." [See 459 F.2d 730.] The Court further indicated that it felt compensatory treatment was called for and that additional

---

in the aggregate in the two-county area and did not require referral employment of minority group individuals in a fixed ratio on any particular job site. This was a clarification of the Court's original interpretation of the plan and its subsequent approval. It did not indicate how the Court would have found had the plan required fixed ratio hiring on particular job sites. From the strong language in the original opinion, however, it does not appear it would have made any difference in the Court's ultimate decision.

remedial measures was necessary. The following order was made:

1. A new exam be made available to all applicants.
2. Those Black and Spanish candidates who failed the 1968-70 exam and passed the new one and qualified otherwise, be placed in a priority pool.
3. A second pool be created containing those then on eligibility lists followed by those who pass the new exam.
4. Certification be made from the two pools according to some ratio — i.e., one from the priority pool for every one, two, or three from the second pool until the priority pool is exhausted.

The Circuit Court did not fix the precise formula to be used, believing that to be a matter for remand. At p. 737, the Court stated:

> "We believe that the preferential status for the priority pool will yield a significant increment of black and Spanish-surnamed police officers in the near term. *We have therefore refrained from couching our guidelines in terms of percentage representation,* which would have entailed resort to assumptions as to relevant areas and populations, and within these, the numbers and proportions of black and Spanish-surnamed persons disposed to seek police work." [Emphasis added.]

This language seems to indicate that the Circuit Court would not hesitate to order or approve "percentage representation" if it deemed it necessary to effect the desired result.

It may be argued that none of the plans involved in the cases cited are as demanding as § 1B. Certainly the cases are distinguishable in a number of respects. However, the language has often been strong and positive that plans similar to § 1B are permissible where there is evidence of past discrimination. This Court has found that racial im-

balance does exist in the Boston area construction trades and that such imbalance is the result of past racial discrimination. As a result of such findings the Court holds that the provision of § 1B requiring contractors to maintain a minimum of 20% minority work force in each job category does not violate the Constitution of the United States, but stands as a proper attempt to remedy the present effects of past discrimination.

Plaintiffs argue that they will be forced to hire unqualified workers and that they will be required to comply with § 1B or suffer sanctions whether or not they exercise good faith. Lest there be any doubt, the Court interprets the contract to require that only "qualified" workers be hired. This includes any hiring of minority workers in compliance with the requirements of § 1B. Defendant Altshuler has sworn by affidavit that he so interprets the contract, and he is bound by that representation. This means that employment based on qualification or merit has not been eliminated by § 1B and it is with this understanding that this section has been so construed by the Court.

Plaintiff also claims § 1B violates the Massachusetts Constitution. The reasoning used in holding § 1B not violative of the United States Constitution can be applied to the Massachusetts Constitution as well. The only Massachusetts case which seems to be at all relevant is of little help. In *Trustees* v. *Volpe Construction Co.*, 264 N.E.2d 676 (1970), defendant had contracted to construct a building for plaintiff which was being partially funded by the federal government. The contract proscribed any racial discrimination by defendant in its hiring policies and required the defendant to take affirmative action to insure that employment practices were carried on without regard to race. [The Supreme Judicial Court treated the case as one in-

volving a contract issue and did not even reach the merits in its final determination.] Defendant argued plaintiff was demanding a quota system. The Court did make clear what it was *not* holding at pages 682 and 683:

> "We do not hold that the number of 'Negroes and Puerto Ricans' employed by the defendant must constitute twenty per cent of the defendant's work force on the project nor do we hold that the University has any right to impose a 'quota' system on the defendant."

The most distinguishing characteristic of this case as opposed to other cases cited above is that there was no allegation of discriminatory policies in the bill. Having found this to be the closest case on point, I find that the Supreme Judicial Court has not determined conclusively whether "ratio hiring" or "quotas" are violative of the Massachusetts Constitution when used to remedy the present effects of past discrimination. This Court now holds that § 1B does not violate any provision of that Constitution.

III Due Process

Plaintiffs further allege that § 1B violates Due Process because it permits the imposition of sanctions without benefit of notice of the alleged breach or opportunity to be heard. It is the Court's opinion that the amendments contained in Addendum No. 2 to § 1B make this question moot. The Bureau can make a determination to impose sanctions only after a full administrative hearing pursuant to M.G.L. c.30A §§ 10, 11. Nor is the fact that the contractor has the burden of showing he made every possible effort to comply so unfair that it violates procedural due process. As defendants point out, the contractor is the one with ready access to records, etc.

IV Massachusetts General Laws, Chapter 151B

Plaintiff argues that § 1B contravenes the legislative scheme established by M.G.L. c.151B to deal with employment discrimination and that the MCAD does not have the necessary legislative authorization to act in the capacity proposed by §1B-11.2. These are questions of state law. For convenience sake and because these matters are so closely related to the other issues of this action, this Court will exercise its discretion under the doctrine of pendent jurisdiction and decide these issues applying Massachusetts law.

M.G.L. c.151B § 4(9) specifically proscribes the commission from requiring preferential treatment because of racial imbalance:

> "Nothing contained in this chapter or in any rule or regulation issued by the commission shall be interpreted as requiring any employer . . . to grant preferential treatment to any individual or to any group because of the race, color . . . because of imbalance which may exist between the total number or percentage of persons employed by any employer . . . and the total number or percentage of persons of such race, color . . . in the commonwealth or in any community, section or other area therein, or in the available work force in the commonwealth or in any of its political subdivisions."

There seems to be no Massachusetts case law interpreting this section. Plaintiff cites cases holding that a state agency may promulgate rules and regulations, but that such rules and regulations must fall within the ambit of the enabling statute. Defendant cites authority for the proposition that when a general power is given all authority necessary to carry it out is inferred by implication. It is the opinion of this Court that an interpretation of c.151B § 4(9) is not necessary as that section is not applicable here, for the following reasons.

Section 4(9) seems to forbid the MCAD from making any "rule" or "regulation" requiring preferential treatment. Under the § 1B-.11.2 scheme, the commission has no "rule making" or "regulatory" powers. The commission investigates alleged non-compliance and reports a finding of such to the bureau with a recommendation of sanctions. Such conduct is within their authority. Section 2 of c.151B provides:

> "The commission, as established by section fifty-six of chapter 6, shall formulate policies to effectuate the purposes of this chapter *and may make recommendations to agencies and officers* of the commonwealth or its political subdivisions in aid of such policies and purposes." [Emphasis added.]

Section 9 of c.151B provides that the provisions of the chapter shall be construed liberally for the accomplishment of the purposes thereof. Construing § 2 liberally, the Court finds the MCAD does have the authority to act pursuant to the relevant provisions of § 1B and upon examination of those provisions finds the commission's duties thereunder are not proscribed by § 4(9) of c.151B.

Plaintiff argues that c.151B itself is incorporated into the plan through § 1B.-08. This is so. However, nothing in § 1B is made under the authority of c.151B. Section 4(9) of that chapter prohibits interpretations of preferential treatment from anything "contained in this chapter . . ." The authority for § 1B comes from nothing "contained" in c.151B but from Executive Order No. 74 and the authority to accept and reject bids given to defendant Poitrast by c.6A § 24 and c.149 § 44A et seq. Defendants have so stated in their briefs and this Court agrees.

V MASSACHUSETTS "PAYMENT STATUTE"

Plaintiff's final argument is that § 1B unlawfully contravenes M.G.L. c.30 § 39F (Payments Statute), since § 1B requires bidders to agree to assess a backcharge against a non-complying subcontractor. Defendant argues that the Payments Statute is not germane because it deals with the payment of amounts due for satisfactory compliance with the contract, while § 1B contemplates a backcharge only where its provisions have not been satisfactorily complied with. This is another question of state law over which the Court will assert its pendent jurisdiction.

Section 1B-.11.2(a) provides as a possible sanction for non-compliance the following:

> "the recovery by the Bureau from the General Contractor of 1/100 of 1% of the contract award price in the nature of liquidated damages or, if a filed Subcontractor is in non-compliance, the recovery by the Bureau from the General Contractor, to be assessed by the General Contractor as a backcharge against the Subcontractor, of 1/10 of 1% of the filed subcontract award price, in the nature of liquidated damages, for each week that such party fails or refuses to comply."

M.G.L. c.30 § 39F(a) & (b) provides for prompt payment to a subcontractor by the general contractor after the general contractor receives either periodic or final payments from the awarding authority. However, the general contractor is authorized to withhold "any amount claimed due from the subcontractor by the general contractor." Such withholding would certainly seem to be in the nature of a "backcharge" as contemplated by § 1B-.11.2(a). Subcontractors are deemed to have agreed to the terms of the contract [See § 1B-.02], and are thus bound by the provisions therein, including § 1B-.11.2(a). If they are found to be in non-compliance, the contractor may certainly consider

the "backcharge" an "amount claimed due from the subcontractor" under the contract. It does not appear to this Court then, that the § 1B provision contravenes the Massachusetts law in any respect as it does in fact comport with § 39F(a) & (b).

In consideration of the foregoing, this Court holds that § 1B's intention to bring about equal employment opportunities for minorities is constitutional in all aspects, and consequently, plaintiff's request for injunctive and declaratory relief is denied.

FRANK A. FREEDMAN
District Judge

APPENDIX A

SECTION 1B

EQUAL EMPLOYMENT OPPORTUNITY ANTI-DISCRIMINATION AND AFFIRMATIVE ACTION

1B-.01 For purposes of this contract, "minority" refers to Orientals, Blacks, Puerto Ricans and North American-Indians. "Commission" refers to the Massachusetts Commission Against Discrimination.

1B-.02 During the performance of this contract, the Contractor and all of (his) Subcontractors (hereinafter collectively referred to as the Contractor), for himself, his assignees, and successors in interest, agrees as follows:

.1 In connection with the performance of work under this contract, the Contractor shall not discriminate against any employee or applicant for employment because of race, color, religious creed, national origin, age, or sex. The aforesaid provision shall include, but not be limited to, the following: employment, up-grading, demotion, or transfer; recruitment advertising; recruitment; layoff; termination; rates of pay or other forms of compensation; conditions or privileges of employment; and selection for apprenticeship. The Contractor shall post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the Commission setting forth the provisions of the Fair Employment Practices Law of the Commonwealth (M.G.L. Chapter 151B).

.2 In connection with the performance of work under this Contract, the Contractor shall undertake in good faith affirmative action measures designed to eliminate any discriminatory barriers in the terms and conditions of employment on the grounds of race, color, religious creed, national origin, age or sex, and to eliminate and remedy any effects of such discrimination in the past. Such affirmative action shall entail positive and aggressive measures to ensure legal opportunity in the areas of hiring, upgrading, demotion or transfer, recruitment, layoff or termination, rate of compensation, and in-service or apprenticeship training programs. This affirmative action shall include all action required to guarantee equal employment opportunity for all persons, regardless of race, color, religious creed, national origin, age, or sex. A purpose of this provision is to ensure to the fullest extent possible an adequate supply of skilled tradesmen for this and future Commonwealth building projects.

1B-.03 .1 As part of his obligations of remedial action under the foregoing section, the contractor shall maintain on this project, which is located in an area in which there are high concentrations of minority group persons, a not less than twenty per cent ratio of minority employee man hours to total employee man hours in each job category, including, but not limited to, those "classes of work" enumerated in section 44c of chapter 149 of the Massachusetts General Laws.

.2 In the hiring of minority journeymen, apprentices, trainees and advanced trainees, the Contractor shall rely on referrals from the Boston Area Construction Program, traditional referral methods utilized by the construction industry, and referrals from agencies, not more than three in number at any one time, designated by the Liaison Committee.

1B-.04 .1 There shall be established for the life of this contract a body to be known as the Liaison Committee. The Liaison Committee shall be composed of one representative each from the Bureau, the Commission, Boston State College, the Boston State Coalition, the Black Student Association of Boston State College, and the Contractors' Association of Boston, Inc.

.2 The Contractor (or his agent, if any, designated by him as the on-site equal employment opportunity officer) shall recognize the Liaison Committee as an affirmative action body, and shall establish a continuing working relationship with the Liaison Committee, consulting with the Liaison Committee on all matters related to minority recruitment, referral, employment, and training.

.3 The Contractor shall prepare projected manning tables on a quarterly basis. These shall be broken down into projections, by week, of workers required in each trade. Copies shall be furnished one week in advance of the commencement of the period covered, and also when updated, to the Commission and to the Liaison Committee.

.4 Records of employment referral orders, prepared by the Contractor on forms furnished by the Commission, shall be made available to the Commission and to the Liaison Committee on request.

.5 The Contractor shall prepare weekly reports on forms furnished by the Commission of hours worked in each trade by each employee, identified as minority or non-minority. Copies of these shall be provided at the end of each such week to the Commission and to the Liaison Committee.

1B-.05 The Contractor shall take affirmative action to involve qualified minority subcontractors in lieu of non-filed sub-bids. This affirmative action shall cover both pre-bid and post-bid periods. It shall include notification to the Office of Minority Business Assistance (within the Secretariat of Communities and Development) or its designee, while bids are in preparation, of all products, work or services for which the Contractor intends to negotiate bids. Minority Subcontractors are encouraged to estimate their work specialty and make their prices known to prospective general contractors during the bidding stages.

1B-.06 In the employment of journeymen, apprentices, trainees and advanced trainees, the Contractor shall give preference, first, to citizens of the Commonwealth who have served in the armed forces of the United States in time of war and have been honorably discharged therefrom or released from active duty therein, and who are qualified to per-

form the work to which the employment relates, and, secondly, to citizens of the Commonwealth generally, and, if such cannot be obtained in sufficient numbers, then to citizens of the United States.

1B-.07 A designee of the Commission and a designee of the Liaison Committee shall each have right of access to the construction site.

1B-.08 *Compliance with Requirements*

The Contractor will comply with the provisions of the Governors Code of Fair Practices, dated July 20, 1970, and of Chapter 151B, as amended, of the Massachusetts General Laws, both of which are herein incorporated by reference and made a part of this contract.

1B-.09 *Non-Discrimination*

The Contractor, in the performance of all work after award, and prior to completion of the contract work, will not discriminate on grounds of race, color, religious creed, national origin, age or sex in employment practices, in the selection or retention of subcontractors, or in the procurement of materials and rentals of equipment.

1B-.10 *Solicitations for Sub-Contracts, and for the Procurement of Materials and Equipment*

In all solicitations either by competitive bidding or negotiation made by the Contractor either for work to be performed under a subcontract or for the procurement of materials or equipment, each potential subcontractor or supplier shall be notified in writing

by the Contractor of the Contractors obligations under this contract relative to non-discrimination and affirmative action.

1B-.11 *Compliance — Information, Reports and Sanctions*

.1 The Contractor will provide all information and reports required by the Bureau or the Commission on instructions issued by either of them and will permit access to its facilities and any books, records, accounts and other sources of information which may be determined by the Commission to affect the employment of personnel. This provision shall apply only to information pertinent to this Section 1B. Where information required is in the exclusive possession of another who fails or refuses to furnish this information, the Contractor shall so certify to the Bureau or the Commission as appropriate and shall set forth what efforts he has made to obtain the information.

.2 Whenever the Bureau, the Commission, or the Liaison Committee believes the General Contractor or any Subcontractor may not be operating in compliance with the terms of this Section 1C, the Commission shall conduct an appropriate investigation, and may confer with the parties, to determine if such Contractor is operating in compliance with the terms of this Section 1C. If the Commission finds the General Contractor or any Subcontractor not in compliance, it shall make a preliminary report of non-compliance, and notify such Contractor in writing of such steps as will in the judgment of the Commission

bring such Contractor into compliance. In the event that such Contractor fails or refuses to fully perform such steps, the Commission shall make a final report of non-compliance, and recommend to the Bureau the imposition of one or more of the sanctions listed below. If, however, the Commission believes the General Contractor or any Subcontractor has taken or is taking every possible measure to achieve compliance, it shall not make a final report of non-compliance. Within fourteen days of the receipt of the recommendations of the Commission, the Bureau shall impose one or more of the following sanctions, as it may deem appropriate to attain full and effective enforcement:

(a) the recovery by the Bureau from the General Contractor of 1/100 of 1% of the contract award price in the nature of liquidated damages or, if a filed Subcontractor is in non-compliance, the recovery by the Bureau from the General Contractor, to be assessed by the General Contractor as a backcharge against the Subcontractor, of 1/10 of 1% of the filed subcontract award price, in the nature of liquidated damages, for each week that such party fails or refuses to comply;

(b) the suspension of any payment or part thereof due under the contract until such time as the General Contractor or any Subcontractor is able to demonstrate his compliance with the terms of the contract;

(c) the termination, or cancellation, of the contract, in whole or in part, unless the General

Contractor or any Subcontractor is able to demonstrate within a specified time his compliance with the terms of the contract;

(d) the denial to the General Contractor or any Subcontractor of the right to participate in any future contracts awarded by the Bureau for a period of up to three years.

.3 If at any time after the imposition of one or more of the above sanctions a Contractor is able to demonstrate that he is in compliance with this Section 1B, he may request the Bureau, in consultation with the Commission, to suspend the sanctions conditionally, pending a final determination by the Commission as to whether the Contractor is in compliance. Upon final determination of the Commission, the Bureau, based on the recommendation of the Commission, shall either lift the sanctions or reimpose them.

APPENDIX B

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF TRANSPORTATION AND CONSTRUCTION
BUREAU OF BUILDING CONSTRUCTION
DIVISION OF STATE COLLEGES

Massachusetts State Project No. E65-4
Contract No. 1
Federal Designation Project No. Mass. 4-1-00638-0
Classroom, Library, Auditorium and Cafeteria Building
Boston State College, Boston, Massachusetts

ADDENDUM NO. 2
November 15, 1972

The attention of bidders submitting proposals for Mass. State Project No. E65-4, Contract No. 1, Boston State College, is called to the following addendum to the Contract Form, Specifications and Drawings. The items set forth herein, whether of omission, addition, substitution or clarification are to be included in and form a part of the proposal submitted.

THE NUMBER OF THIS ADDENDUM (NO. 2), *MUST* BE ENTERED IN SPACE B PROVIDED AFTER THE WORD "NUMBERED" ON PAGE 4 OF THE CONTRACT FORM ENTITLED "FORM FOR GENERAL BID" AND IN PARAGRAPH B ON SUB-BID FORM BBC 18.

A. *Contract Form Change*

Attention General Bidders:

After page 7 of the contract form insert new pages 7A, 7B, 7C and 7D which becomes a part of the contract form.

These pages must be completed and submitted with the bid documents.

Attention Filed Sub Bidder:

All filed sub bidders shall as a condition of bid, *complete* and *attach* to their filed sub-bid form pages 7A, 7B, 7C and 7D which are transmitted as part of addenda #2.

Attention is directed to pages 7B, 7C and 7D which will require signatures.

B. *Specification Changes*

Section IB-.11.2, fifth sentence: after the word "shall," insert the words: — move to —.

IB-.11.4 — "Action taken by the Bureau under sections 1B-.11.2 or 1B-.11.3 shall be an adjudicatory proceeding as that term is used in M.G.L. c. 30A, and shall comply with M.G.L. c. 30A s. 10, 11. No investigation by the Commission shall be initiated without prior notice to the Contractor."

"Section 1B-.12.1 SEVERABILITY. — The provisions of this Section 1B are severable, and if any of these provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not effect or impair any of the remaining provisions."

Insert after page 1B-5, Part II pages 1 thru 17.

1B-.05 The Contractor shall take affirmative action to involve qualified minority subcontractors in lieu of non-filed sub-bids. This affirmative action shall cover both pre-bid and post-bid periods. It shall include notification to the Office of Minority Business Assistance (within the Secretariat of Communities and Development) or its designee, while bids are in preparation, of all products, work or

services for which the Contractor intends to negotiate bids. Minority Subcontractors are encouraged to estimate their work specialty and make their prices known to prospective general contractors during the bidding stages.

1B-.06 In the employment of journeymen, apprentices, trainees and advanced trainees, the Contractor shall give preference, first, to citizens of the Commonwealth who have served in the armed forces of the United States in time of war and have been honorably discharged therefrom or released from active duty therein, and who are qualified to perform the work to which the employment relates, and, secondly, to citizens of the Commonwealth generally, and, if such cannot be obtained in sufficient numbers, then to citizens of the United States.

1B-.07 A designee of the Commission and a designee of the Liaison Committee shall each have right of access to the construction site.

1B-.08 *Compliance with Requirements*

The Contractor will comply with the provisions of the Governor's Code of Fair Practices, dated July 20, 1970, and of Chapter 151B, as amended, of the Massachusetts General Laws, both of which are herein incorporated by reference and made a part of this contract.

1B-.09 *Non-Discrimination*

The Contractor, in the performance of all work after award, and prior to completion of the contract work, will not discriminate on grounds of race, color, religious creed, national origin, age or sex in

employment practices, in the selection or retention of subcontractors, or in the procurement of materials and rentals of equipment.

1B-.10 *Solicitations for Sub-Contracts, and for the Procurement of Materials and Equipment*

In all solicitations either by competitive bidding or negotiation made by the Contractor either for work to be performed under a subcontract or for the procurement of materials or equipment, each potential subcontractor or supplier shall be notified in writing by the Contractor of the Contractor's obligations under this contract relative to non-discrimination and affirmative action.

(c) the termination, or cancellation, of the contract, in whole or in part, unless the General Contractor or any Subcontractor is able to demonstrate within a specified time his compliance with the terms of the contract;

(d) the denial to the General Contractor or any Subcontractor of the right to participate in any future contracts awarded by the Bureau for a period of up to three years.

.3 If at any time after the imposition of one or more of the above sanctions a Contractor is able to demonstrate that he is in compliance with this Section 1B, he may request the Bureau, in consultation with the Commission, to suspend the sanctions conditionally, pending a final determination by the Commission as to whether the Contractor is in compliance. Upon final determination of the Commission, shall either lift the sanctions or reimpose them.

United States Court of Appeals

For the First Circuit

No. 73-1250

ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS, INC., et al.,

PLAINTIFFS, APPELLANTS,

v.

ALAN ALTSHULER, et al.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
MOORE* and MCENTEE, *Circuit Judges*.

James J. O'Leary, with whom *Joseph P. Rooney, Ansel B. Chaplin, Gaston, Snow, Motley & Holt*, and *James E. Flynn, Jr.*, were on brief, for appellants.

Dennis L. Ditelberg, Assistant Attorney General, and *Gershon M. Ratner*, with whom *Robert H. Quinn*, Attorney General, *John F. Houton*, Assistant Attorney General, *Michael J. Hoare*, Special Assistant Attorney General, *Benjamin Jones*, and *Robert City* were on brief, for appellees.

Robert T. Moore, Attorney, Department of Justice, with whom *William J. Kilberg*, Solicitor of Labor, *J. Stanley Pottinger*, Assistant Attorney General, *James N. Gabriel*, United States Attorney, and *David L. Rose*, Attorney, Department of Justice, were on brief, for The Secretary of Labor of The United States, Amicus Curiae.

Jerry Cohen, Morris Shubow, John Henn, John Reinstein, Matthew Feinberg, Charles A. Levin, Mark A. Michelson, and *Stephen R. Moore* on brief for Civil Liberties Union and American Jewish Congress, New England Region, Amici Curiae.

November 30, 1973

COFFIN, *Chief Judge*. This is an appeal from a judgment sustaining, as constitutional and in accord with state law,

* Of the Second Circuit, sitting by designation.

certain contract requirements imposed by the Commonwealth of Massachusetts upon contractors engaged in publicly funded construction work at Boston State College. Appellants are thirteen individual construction companies, now engaged in construction of public buildings for the Commonwealth, and a membership corporation comprised of one hundred forty-five general contracting firms which together perform approximately eighty per cent of all construction in the Commonwealth. Each of the appellants was a prospective bidder for the Boston State College contract.

In relevant part, § 1B of the contract requires that the contractor

> ". . . maintain on his project, which is located in an area in which there are high concentrations of minority group persons, a not less than twenty percent ratio of minority employee man hours to total employee man hours in each job category . . . ."

Section V, ¶ 3, of the contract provides, however, that the contractor must hire only "competent" workers. The Secretary of Transportation and Construction for the Commonwealth, who is charged with enforcing the contract provisions, interprets this to mean that § 1B requires the hiring of only "qualified" workers. The district court has interpreted the contract in the same way.

The contract also requires that the contractor engage in special referral procedures as well as traditional referral methods, cooperate with a Liaison Committee composed of various representatives from community groups, make weekly compliance reports to the Liaison Committee and the Massachusetts Commission Against Discrimination (M.C.A.D.), and permit the M.C.A.D. access to books, records, and accounts containing employment information.

The contract further stipulates that the M.C.A.D. will investigate any alleged non-compliance with the contract terms and notify the contractor of both its findings and recommendations as to how he might comply with the terms. If the contractor fails to accept the recommendations and in addition the M.C.A.D. determines that the contractor has not taken "every possible measure to achieve compliance", the M.C.A.D. will report its findings to the Bureau of Construction and recommend that specific sanctions be imposed. Before imposing any sanctions, however, pursuant to the Commonwealth's Administrative Procedures Act, M.G.L.A. c. 30A, §§ 10, 11, and according to the Secretary of Transportation and Construction, the Bureau will provide the contractor with notice of the findings and a hearing in which he may challenge them.

Because the federal government pays a portion of the construction costs of the Boston State project, contractors are also required to accept federal bid conditions, promulgated by the United States Secretary of Labor pursuant to § 201 of Executive Order No. 11246 (30 F.R. 12319, as amended, 32 F.R. 14303; 34 F.R. 12985) and 41 C.F.R. 60. The specific contractual elements of the federal bid conditions are derived from the Boston Area Construction Program (the Boston Plan), a "hometown" equal employment opportunity plan prepared by the local construction industry in cooperation with the Department of Labor. Unlike the Commonwealth's § 1B, the federal Boston Plan sets area-wide percentage objectives for minority hiring within each trade, rather than percentage goals for each project. Under the Boston Plan the responsibility for fulfilling the objectives does not lie with the individual contractor; he merely agrees to hire whatever minority workers are referred to him by the trades unions in the course of the

plan's operation. Moreover, while § 1B requires that contractors take "every possible measure" to comply with the contract terms, the Boston Plan necessitates merely a "good faith" effort by the contractor. A fourth point of difference between the two plans is that the Boston Plan places the burden of proving non-compliance upon the government agency, while § 1B places the burden of proving compliance, once non-compliance has been alleged, upon the contractor himself.

Appellants challenge the constitutionality of § 1B of the contract requirements imposed by the Commonwealth on three grounds: They contend, first, that § 1B varies so significantly from the federal bid conditions of the Boston Plan that it violates the Supremacy Clause of Article VI; second, that § 1B imposes a fixed racial hiring quota which violates the Equal Protection clause of the Fourteenth Amendment; and finally, that § 1B permits the imposition of sanctions without proper notice or an opportunity to be heard, in violation of the Due Process clause of the Fourteenth Amendment. Appellants also contend, pursuant to the pendent jurisdiction of this court, that § 1B involves the M.C.A.D. in activities which go beyond the scope of its enabling legislation.

I

In order to deal with appellants' first contention, that § 1B violates the Supremacy Clause because the federal Boston Plan must necessarily preempt § 1B, it is necessary to set out the context in which this case arises.

We note at the outset that the construction industry has been particularly slow, throughout the nation, to open

itself to racial minorities.[1] For this reason, in 1967 the federal government launched pilot plans in several cities designed to increase minority employment on federally funded construction projects by way of "affirmative action" programs. Executive Order 11246,[2] under which the Secretary of Labor was authorized to promulgate such programs,[3] required that contractors "take affirmative action to ensure that applicants are employed . . . without regard to race . . . ." Affirmative action itself was defined as "specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables . . . ."[4]

After several different affirmative action programs had been implemented, with varying degrees of success,[5] in

---

[1] *See* Marshall, *The Negro and Organized Labor*, 118-28 (1965); Hill, *The Racial Practices of Organized Labor: The Contemporary Record*, in The Negro and the American Labor Movement 313-314 (J. Jacobson, ed., 1968).

As of May 19, 1970, only 11.8% of the 1.1 million members of the construction unions in America were members of racial minorities. The higher the skilled union, the smaller the percentage of minority workers becomes: 38.3% of construction laborers are members of racial minorities, while 5.1% of electrical workers, and 2.1% of plumbers. Equal Employment Opportunity Commission Release No. 70-15 (May 19, 1970).

[2] 30 Fed. Reg. 12319, as amended 32 Fed. Reg. 14303.

[3] Under the Secretary of Labor's regulations, the Director of the Office of Contract Compliance (O.F.C.C.) has full authority to implement the policies of the Secretary. Thus, the position of the O.F.C.C. is analogous to that of the Commonwealth's Bureau of Construction.

[4] 41 C.F.R. § 60. 1.40(a) (Supp. 1970).

[5] Plans have been promulgated for Philadelphia, Washington, D.C., St. Louis, Atlanta, and Camden, N.J. *See* 41 C.F.R. 60.5, 60.6, 60.8, and 38 F.R. 21533 (Aug. 10, 1973). Such "imposed" plans operate only on the contractors; they do not require, and typically do not have, the cooperation of the unions involved.

1970 the government permitted particular communities to develop their own "hometown" affirmative action programs.[6] If the Secretary of Labor approved the plans,[7] the plans would receive federal funding, and local contractors who complied with them would thereby comply with the mandate of Executive Order 11246.[8]

The Boston Plan emerged from negotiations between representatives of buildings trades unions, contractors, and minority communities in the Boston area, and was approved by the Secretary of Labor in the fall of 1970. Although it fulfilled its first year goal of training and placing three hundred sixty minority workers, relationships with the minority community representatives deteriorated to the extent that the Department of Labor withheld second year funding until a revised plan could be negotiated. The new plan, beginning operations in January, 1972, did not have the participation of representatives of Boston's minority

---

[6] There are now approximately forty-seven hometown plans finally approved by the O.F.C.C., including approximately twenty-nine federally funded training programs.

[7] The O.F.C.C. determines the adequacy of the hometown plan by considering such factors as (1) the minority population of the area to be covered by the plan; (2) the minority manpower utilization in the industry (on a trade by trade basis); (3) the availability of minorities for employment; (4) the need and availability of training programs; and (5) the projected growth and attrition factors of the area industry in the near future.

[8] For any trades or contractors not participating in the hometown plan, Part II of the federal bid conditions sets forth mandatory affirmative action requirements for each individual contractor, generally paralleling those of the hometown plan. The principal distinction with respect to Parts I and II of the bid conditions is that the obligations under Part II are individual obligations that run to a contractor's own work force, with each contractor responsible for its own training program. Under Part I (the hometown plan), the minority hiring goals are obligations of the trade, and it is the administrative committee of the hometown plan that assigns fair share goals to the individual contractors.

communities.[9] In addition, although put into effect two years after the original Boston Plan had commenced, the revised plan retained the same minority employment goal as that of the original plan.

At about the same time as the revised Boston Plan was put into effect, the Commonwealth began an inquiry of its own into the need for a separate state affirmative action program. The inquiry revealed that despite the existence of the federal Boston Plan, minority membership in all of the nineteen participating unions amounted to less than four per cent of union membership, while minorities comprised approximately twenty-three per cent of the population of Boston. Since virtually all of the contractors who engage in state funded projects rely upon these predominantly white unions for workers, minority employment in the construction trades continued to be extremely low. The Commonwealth also determined that the Boston Plan had no provision for the collection of reliable data on the actual number of hours worked by minority workers placed on construction jobs. Finally, in the opinion of the Commonwealth's Office of Transportation and Construction, the Boston Plan lacked adequate enforcement machinery.[10] On the basis of these findings the Commonwealth concluded that the federal Boston Plan had not gone far enough, and that a separate, state affirmative action program was required for construction projects in which state funds were committed.

---

[9] The United States Department of Labor is now funding a subcontract with the Recruiting and Training Program (formerly the Workers Defense League), a minority organization which is providing recruiting, training, and referrals for the Boston Plan.

[10] The Commonwealth was also of the view that it is desirable to concentrate minority employment in the trade in projects in or near minority neighborhoods. Thus, the Commonwealth contends that its plan is not designed simply for the purpose of increasing minority employment but also for altering the geographic distribution of placements.

The contract for the construction of Boston State College is the first to incorporate both the Commonwealth's own § 1B bid conditions, promulgated under authority of the Governor's Executive Order No. 74, and the federal Boston Plan bid conditions. The Assistant Secretary of Transportation and Construction for the Commonwealth has determined that there exist adequate journeymen, apprentices, and trainees within Boston's minority community to provide at least twenty per cent of the work force for the project, as well as for other projects anticipated in the area.[11] It is estimated that the total work force required for the Boston State Project will vary between forty-seven and one hundred fifty persons; contractors on the project must therefore take "every possible measure" to employ between ten and thirty qualified minority workers.

Appellants contend that because the Commonwealth's § 1B affirmative action program places different requirements upon contractors than those of the Boston Plan, the two are in conflict, and that the state plan must therefore be declared invalid. Appellants point out, most particularly, that under § 1B, contractors must bear the burden of showing that they have taken "every possible measure" to comply, whereas under the Boston Plan, they must have made merely a "good faith effort" and the burden of showing non-compliance rests with the government agency. They also stress that the record keeping and referral requirements of § 1B are more onerous than those of the Boston Plan.

In deciding whether state regulations should be invalidated because they conflict with federal law, courts have

---

[11] The district court found that the minority populations of neighborhoods in which the Commonwealth's plan is to be applied is approximately 40%.

tended to examine both the possibility of broad conflict in "purposes and objectives" between the two schemes, *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1940), and the likelihood of specific conflict in the implementation of the two programs.

Clearly, the broad purposes which lay behind the federal Boston Plan and the Commonwealth's § 1B are congruent. Affirmative action, defined in the President's Executive Order as ". . . steps to guarantee equal employment . . . including . . . the development of specific goals and time tables . . ." has the same meaning as affirmative action as defined in the Governor's Executive Order: ". . . positive and aggressive measures to insure equal opportunity." Both plans envisage minority hiring goals as a means of achieving equal opportunity.

Nothing in the President's Executive Order requires that affirmative action taken under the Order be uniform throughout the country, nor does it necessitate that the federal government be the source for every program. An important aspect of federal implementation is the development of "hometown" plans, conceived and developed by local contractors, unions, and minority representatives. And in at least one instance the federal government has relied upon a plan originally conceived by state officials for their own state funded contracts. *See Illinois Builders Ass'n* v. *Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972).

Nor is there any indication that the federal government has intended to preempt this field. Federal preemption should not be presumed, absent "a clear manifestation of intention" to preempt the field. *Schwartz* v. *Texas*, 344 U.S. 199, 202-203 (1952); *see also New York State Department of Social Service* v. *Dublino*, 41 U.S.L.W. 5047 (U.S. June 21, 1973). The President's Executive Order merely

requires that contractors take some "affirmative action" and directs the Secretary of Labor to "use his best efforts" through "state and local agencies" as well as federal agencies. The Secretary of Labor has stated, as amicus curiae, that the federal program is not meant to preempt state programs such as the Commonwealth's § 1B. And congressional policy in this area, as expressed in Title VII of the Civil Rights Act of 1964, the statute most closely analogous to the President's Executive Order, is clearly one of encouraging state cooperation and initiative in remedying racial discrimination. Title VII, 42 U.S.C. § 2000h-4 expressly disclaims any intent to preempt state action. *See also Voutsis* v. *Union Carbide*, 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1971).

Even if there is no conflict between the purposes and objectives of the two schemes, the state plan might still be invalid if there is a showing of "such actual conflict between the two schemes of regulation that both cannot stand in the same area . . . ." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141 (1963); *see also Perez* v. *Campbell*, 402 U.S. 637, 649-53 (1971). While we acknowledge that § 1B may be more demanding than the Boston Plan, and may well involve higher administrative costs, there is no reason to suppose that contractors could not comply with both at the same time. By complying with § 1B's minority hiring goals on projects funded by both the state and the federal government, contractors would also comply with the Boston Plan's goals. The reporting requirements are different for the two plans, but this merely necessitates the filing of two different sets of reports.

The only place where the two plans might be found slightly incompatible is in the area of trade union referrals.

Recognizing that union reluctance to admit minorities to apprenticeship programs has been one primary reason for the small percentage of minorities in the construction trades,[12] the Boston Plan focusses upon encouraging area-wide minority recruitment into the unions, and therefore does not alter the patterns of contractor reliance upon the unions for referrals. The Commonwealth's § 1B, however, facilitates referrals from sources other than the unions by providing alternative mechanisms for recruiting minority workers.

We think, however, that there is little likelihood that § 1B would discourage union initiative in training and recruiting minorities. The Commonwealth's program will operate on a small scale, only within neighborhoods with a high minority population; the contractors for the Boston College project are required to employ approximately thirty minority workers. The federal Boston Plan is designed to train and place three hundred sixty minority workers each year drawn from all over the state. Therefore, despite the Commonwealth's program, buildings trades unions will be obligated to continue their efforts at recruiting minority workers and referring them to contractors. Furthermore, the Commonwealth's program does not prohibit union referrals. It merely provides other sources for referrals. Thus, § 1B might actually induce a stepped-up program of union recruitment if the unions are desirous of maintaining contractor reliance upon union referrals.

We conclude, therefore, that § 1B presents no challenge to the Supremacy Clause.

---

[12] *See* Employment and Manpower Problems in the Cities: Implications of the Report of the National Advisory Commission on Civil Disorders, Hearings Before the Joint Economic Comm., 90th Cong., 2d Sess. at 38 (1968).

II

Appellant's second contention, that the Commonwealth's § 1B imposes a fixed racial hiring quota which violates the Equal Protection clause of the Fourteenth Amendment, presents a more difficult issue, the implications of which stretch far beyond this particular dispute.

The first Justice Harlan's much quoted observation that "the Constitution is colorblind . . . [and] does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights", *Plessy* v. *Ferguson,* 163 U.S. 537, 554 (1896) (dissenting opinion) has come to represent a long-term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

Intentional, official recognition of race has been found necessary to achieve fair and equal opportunity in the selection of grand juries, *Brooks* v. *Beto,* 366 F.2d 1 (5th Cir. 1966); tenants for public housing, *Otero* v. *New York City Housing Authority,* 42 U.S.L.W. 2185 (2d Cir. Sept. 12, 1973); *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968); *Gautreaux* v. *Chicago Housing Authority,* 304 F. Supp. 736 (N.D. Ill. 1969); school administrators, *Porcelli* v. *Titus,* 431 F.2d 1254 (3d Cir. 1970); and children who are to attend a specific public school, *Swann* v. *Charlotte-Mechlenburg Board of Education,* 402 U.S. 1 (1971).

The intentional, official recognition of race in the selection of union members or construction workers has been constitutionally tested and upheld in two contexts. The first is where courts have ordered, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), remedial action for past discrimination. In fulfilling their "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past . . .", *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965), courts have ordered unions to grant immediate membership to a number of minority applicants, *United States* v. *Wood, Wire, and Metal Lathers International Union, Local No. 46*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 41 U.S.L.W. 3645 (U.S. June 12, 1973); to begin an affirmative minority recruitment program, *United States* v. *Sheet Metal Workers International Ass'n, Local No. 36*, 416 F.2d 123 (8th Cir. 1969); to match normal referrals with minority referrals until a specific objective has been obtained, *Heat and Frost Workers, Local 53* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); or to take on a certain number of minority apprentices for each class of workers, *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971). Courts have also ordered employers to hire minority employees up to thirty per cent of the total work force, *Stamps* v. *Detroit Edison*, 42 U.S.L.W. 2200 (E.D. Mich. Oct. 2, 1973); to hire one minority worker every time two white workers were hired, up to a certain number, *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); and in our own *Castro* v. *Beecher*, 459 F.2d 725 (1972), we ordered that black and Spanish-speaking applicants for police positions, who had failed to measure up to a constitutionally impermissible set of hiring standards, be given priority in future hiring.

The second context in which race has been recognized as a permissible criterion for employment is where courts have upheld federal affirmative action programs against challenges under the Equal Protection clause or under the anti-preference provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-2(j). Recognizing that the discretionary power of public authorities to remedy past discrimination is even broader than that of the judicial branch, *see Swann* v. *Charlotte-Mecklenburg, supra* at 16; *cf. Katzenbach* v. *Morgan,* 384 U.S. 641, 653 (1966), courts have upheld the specific percentage goals and time tables for minority hiring found in the Philadelphia Plan, *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor,* 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 P.S. 854 (1971) the Cleveland Plan, *Weiner* v. *Cuyahoga Community College District,* 19 Ohio St.2d 35, 249 N.E.2d 907, 908 (1969), *cert. denied,* 396 U.S. 1004 (1970), the Newark Plan, *Joyce* v. *McCrane,* 320 F. Supp. 1284 (D. N.J. 1970), and the Illinois Ogilvie Plan, *Southern Illinois Builders Ass'n* v. *Ogilvie,* 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd,* 471 F.2d 680 (7th Cir. 1972).

Despite ample precedent for using race as a criterion of selection where the goal is equal opportunity, we approach its use in the present case with care. This marks the first time to our knowledge, that a court has been asked to sanction a plan for hiring a specific percentage of minority workers that requires an employer to take "every possible measure" to reach the goal on each job site, and places upon him the burden of proving compliance, under threat of serious penalties if that burden is not sustained. It is but a short step from these requirements to a demand that an employer give an absolute percentage preference to

members of a racial minority, regardless of their qualifications and without consideration for their availability within the general population. The Commonwealth's affirmative action plan forces us to address a fundamental question: are there constitutional limits to the means by which racial criteria may be used to remedy the present effects of past discrimination and achieve equal opportunity in the future?

There are good reasons why the use of racial criteria should be strictly scrutinized and given legal sanction only where a compelling need for remedial action can be shown. *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1969). Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality.[13] It may also have unexpected results, such as the development of indicia for placing individuals into different racial categories. Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into a malignant preference at other times.[14] Moreover, a racial preference for members of one minority might result in discrimination against another minority, a higher proportion of whose members had previously enjoyed access to a certain opportunity.

---

[13] *See* Kaplan, *Equal Justice in an Unequal World: Equality for the Negro — The Problem of Special Treatment*, 61 Nw. U. L. Rev. 363 (1966).

[14] For example, a preference for induction into the armed services might appear to some to be a positive opportunity for training and steady work, yet might also appear at other times or to other people to be a somewhat negative opportunity.

In the present instance, there is no question that a compelling need exists to remedy serious racial imbalance[15] in the construction trades, particularly in Roxbury, Dorchester, and South End, where minorities constitute approximately forty per cent of the population, and yet only about four per cent of the membership of buildings trades unions, and where there has been a long history of racial discrimination in those unions. Such an imbalance within the relatively lucrative, highly visible, and expanding construction trades undermines efforts at achieving equal opportunity elsewhere in the economy, and contributes to racial tensions.[16]

Even where a long history of discrimination and continuing racial imbalance compels the remedial use of racial criteria, however, the means chosen to implement the compelling interest should be reasonably related to the desired end. *See Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor, supra*, 311 F. Supp. at 1011; *cf. McLaughlin* v. *Florida*, 379 U.S. 184, 193 (1964). A program which included unrealistic minority hiring goals might impose an unreasonable burden on the employer and upon qualified workers who were denied jobs because they were

---

[15] Based upon information revealed in the depositions of several union officials, and other statistical information such as the "Equal Employment Opportunity Local Union Reports", the district court concluded that racial imbalance does exist in the Boston construction trades and such imbalance is the result of past discriminatory practices on the part of many "entities" in that industry. Such inferences from statistical showings of racial imbalance are permitted. *See, e.g., Carter* v. *Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971); *Parkham* v. *Southwestern Bell Telephone*, 433 F.2d 421, 426 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245, 247 (10th Cir. 1970).

[16] If, at some future time, racial balance were to be achieved in Boston's construction trades, we assume that there would no longer exist a compelling need for remedial action, and the use of such racial criteria would no longer be warranted.

not members of the racial minority. Unrealistically high goals are likely, in addition, to forment racial tensions and to prompt employers to circumvent the rules.

A program of affirmative action might be considered to impose unrealistic and unreasonable hiring goals if it included a racial preference that could not be fulfilled, or could be fulfilled only by taking on workers who were unqualified for the trainee, apprentice, or journeyman status for which they were hired. Equal opportunity is an elusive concept, but at its core it carries the simple mandate that opportunities should be open to all on the basis of competence alone. Thus, it would be consistent with the goal of equal opportunity to give first priority to members of a minority that had previously been denied equal opportunity, if those members were otherwise as qualified as were qualified members of the majority population. In order that this special treatment be meaningful, of course, there should be equal opportunity to gain the training necessary to qualify.[17]

While § 1B says nothing about hiring "qualified" minority workers, § V, ¶ 3 of the same contract requires that the contractor hire only "competent" workers. The district court has interpreted § 1B in light of § V, ¶ 3, to require that the twenty per cent minority employees of § 1B be "qualified" for the status to which they were assigned. The Commonwealth's Secretary of Transportation and Construction, who is charged with implementing these provisions, has interpreted § 1B in the same way.

Appellants maintain, however, that the goal of twenty per cent minority workers on each construction site, com-

[17] Thus, presumably, to be "qualified" for a training program would require less competence than to be "qualified" for apprenticeship or journeyman status.

bined with the contractor's burden of proving that he has taken "every possible measure to achieve compliance" with the goal, will necessarily move the contractor to hire unqualified minority workers, rather than run the risk of incurring sanctions. While we think that this is an unwarranted concern, given that the Boston State College project will require approximately thirty minority workers, we concede that, in principle, a high percentage goal for minority hiring combined with a high burden of proving compliance might create the likelihood that unqualified workers would be hired.

Despite the fact that the Secretary of Transportation and Construction alleges that the twenty per cent goal was based upon an assessment of current availability of minority journeymen, apprentices, and trainees, courts are ill-equipped to judge the accuracy of such assessments. It becomes important, therefore, that affirmative action plans, such as the Commonwealth's § 1B, contain fair procedures for contractors to make a showing that insufficient qualified minority workers are available. Thus, any reasonable program designed to remedy racial imbalance must incorporate the necessary elements of due process. So long as contractors receive notice and a meaningful opportunity to challenge any allegations of non-compliance and prove that they have taken whatever efforts are required of them to comply, it is less important that a particular percentage goal might be slightly optimistic or unrealistic, given current availability of qualified minority workers.

Appellants' contention that § 1B violates the Equal Protection clause is therefore intimately tied to their contention that § 1B, in violation of the Due Process clause, permits the imposition of sanctions without proper notice or an opportunity to be heard, an issue to which we now turn.

III

Appellants' due process claim concerns § 1B.2 of the contract provisions, which states, *inter alia,* that ". . . the Commission (M.C.A.D.) shall make a final report of non-compliance, and recommend to the Bureau [of Construction] the imposition of one or more of the sanctions listed below . . . . [T]he Bureau shall impose one or more of the following sanctions, as it may deem appropriate . . . ."

The M.C.A.D.'s determination of non-compliance is made *ex parte.* Contractors are notified of the findings and given an opportunity to take specific steps which would, in the opinion of the M.C.A.D., bring them into compliance, but contractors are not permitted to challenge the findings of non-compliance at this juncture.

The Bureau of Construction is required, pursuant to the Commonwealth's Administrative Procedure Act, M.G.L.A. c. 30A, §§ 10, 11, to hold a hearing before any penalties may be imposed on the contractors for non-compliance. What is in dispute is the scope of this hearing. Appellants maintain that § 1B.2 allows, at most, a challenge to the particular sanction which the M.C.A.D. has recommended, in favor of what might be contended to be a more appropriate sanction, but not a challenge to the truth of the M.C.A.D.'s basic findings of non-compliance. If appellants' interpretation of § 1B.2 were correct, their due process claim would have some merit, because contractors would be subject to serious penalties, such as debarment from participation in state contracts for three years, without having had an opportunity to contest the findings on which the imposition of the penalty was based. *See Boddie* v. *Connecticut,* 401 U.S. 371, 377-79 (1971); *cf. Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969).

We do not think, however, that § 1B.2 must necessarily be interpreted to require such a narrowing of the scope of the administrative hearing. The contract states that the Bureau "shall impose" one of the sanctions only "as it may deem appropriate to attain full and effective enforcement." It would seem perfectly consistent with this mandate for the Bureau to determine for itself that the contractor had in fact taken "every possible measure" to achieve compliance, despite the findings of the M.C.A.D. to the contrary, and that any sanction would be inappropriate. The presumption of constitutionality customarily accorded state statutes, e.g., *United States* v. *Carolene Products*, 304 U.S. 144, 152 (1938), would dictate that we apply this interpretation. The Supreme Judicial Court of Massachusetts has, moreover, construed certain other Commonwealth statutes, facially lacking express provisions for notice and hearing, as impliedly calling for such due process requirements. *See Rohrer, Petitioner*, 353 Mass. 282 (1967); *O'Leary, Petitioner*, 325 Mass. 179 (1950).

The Commonwealth's Secretary of Transportation and Construction has given the foregoing interpretation to § 1B.2, and has stipulated that no sanctions may be imposed against a contractor until he has had a full hearing before officials of the Bureau of Construction in which he may challenge any findings of non-compliance by the M.C.A.D. Since the Secretary is entrusted with interpretation and implementation of the contract provisions, his view is at least entitled to "respectful consideration", *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 96 (1935). We see no reason not to accept his interpretation in this case, *Law Students Research Council* v. *Wadmond*, 401 U.S. 154, 162 (1971), and indeed condition our holding on the consistent application of this interpretation. We conclude, therefore, that

§ 1B so construed does not violate the Due Process clause of the Fourteenth Amendment.

Since contractors are provided with notice and a full opportunity to contest allegations of non-compliance, they may thereby show that insufficient qualified minority workers were available. Therefore, in light of our preceding analysis, we find that § 1B does not violate the Equal Protection clause of the Fourteenth Amendment.

IV

Appellants' final contention, which comes within the compass of our pendent jurisdiction, is that the Commonwealth's § 1B program involves the M.C.A.D. in activities that are prohibited by the anti-preference clause of M.G.L.A. c. 151B, § 4. This clause provides, in relevant part that ". . . nothing contained in this chapter or in any rule or regulation issued by the Commission [M.C.A.D.] shall be interpreted as requiring any employer, employment agency or labor organization to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group . . . ."

The anti-preference clause has not been interpreted by Massachusetts courts. The district court determined, however, that the statute is inapplicable to activities of the M.C.A.D. carried on pursuant to § 1B for two reasons. The first is that the anti-preference clause applies only to regulations issued by the M.C.A.D., while under § 1B the M.C.A.D. merely investigates and makes recommendations under regulations promulgated by the Secretary of Transportation and Construction. The second reason is that, contrary to the assertions of appellants, the clause applies only to authority vested in the statute itself, while the authority for § 1B stems from the Governor's Executive

Order No. 74 and from M.G.L.A. c. 6A, § 24 and c. 149 § 44A, both of which provide for the acceptance or the rejection of bids. We agree with this analysis.

In addition, we would point to the way in which federal courts have dealt with the anti-preference provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j), which is analogous to the Commonwealth's anti-preference clause. In *United States* v. *I.B.E.W. Local 38*, 428 F.2d 144 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970), the court construed that provision to mean that an employer was not required to grant preferential treatment to minorities merely because of racial imbalance on his work force, but that some preference might be required to remedy the present effects of past discrimination. "Any other interpretation would allow complete nullification of the stated purpose of the Civil Rights Act of 1964". *Id.* at 149-50. *See also Carter* v. *Gallagher, supra.*

It is undisputed that past racial discrimination in Boston's construction trades is in large part responsible for the present racial imbalance. Given this fact, we find it difficult to conceive that Massachusetts would interpret its own anti-preference provision in such a way as to prohibit programs designed to remedy that imbalance.

We conclude, therefore, that the Commonwealth's § 1B is violative of neither state law nor the federal Constitution.

Affirmed.

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 73-1250

ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS, INC., et al.,

PLAINTIFFS, APPELLANTS,

v.

ALAN ALTSHULER, et al.,

DEFENDANTS, APPELLEES.

JUDGMENT

Entered: November 30, 1973

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS, INC., ET AL.,
Plaintiffs

v.

ALAN ALTSHULER, as he is Secretary of the Executive Office of Transportation and Construction; and WALTER J. POITRAST, as he is Director of the Bureau of Building Construction,
Defendants

CIVIL ACTION No. 72-3410-F

AFFIDAVIT

DISTRICT OF COLUMBIA ss:

WILLIAM J. KACVINSKY, being duly sworn, deposes and says:

1. I, William J. Kacvinsky, am the Chief, Division of Program Administration, Office of National Projects, Manpower Administration, United States Department of Labor, Washington, D. C., and I have been so employed since November 1970.

2. On October 16, 1970, there was executed between this Office and the Construction Jobs Program of Boston, Inc., a contract for the training and placement of minorities in

the construction trades in the greater Boston area. The contract involved the sum of $583,730 and called for the training and placement of no fewer than 360 minority trainees. That goal was surpassed by the achievement of 367 placements during the term of the contract which expired on October 15.

3. There was no contractual relationship between this Office and the Construction Jobs Program of Boston, Inc., or a similar entity for the training and placement of minority trainees during the period October 16, 1971 through January 19, 1972.

4. On January 20, 1972, this Office executed a contract for the training and placement of minorities in the construction trades in the greater Boston area with the Boston Area Construction Program, Inc. This contract anticipates the training and placement of no fewer than 326 minority trainees and involves the sum of $420,235. As of October 31, 1972, reports from the Boston Area Construction Program, Inc., indicate that 275 minority trainees have received training and placement under this contract and it is anticipated that the goal of 326 will be met or exceeded. I regard the present training program between this Office and the Boston Area Construction Program, Inc. (popularly known as the Boston Plan) as a successful one fully meeting the expectations of this Office.

/s/ WILLIAM J. KACVINSKY
WILLIAM J. KACVINSKY

Signed and Dated this 21st day of December, 1972.

/s/ JEANETTE S. SMITHSON
Notary Public

EXECUTIVE OFFICE
TRANSPORTATION AND CONSTRUCTION
30 May 1972

Two years ago, a tripartite negotiation involving representatives of construction labor unions, contractors, and the minority community produced agreement on a five year program for integrating the construction labor force within a labor market area consisting of the central 24 cities and towns in the Boston region. This agreement provided for annual interim targets on the path to full integration, for an administrative mechanism to implement the achievement of these targets, and for a related set of administrative mechanisms to monitor the rate of progress. The annual targets agreed upon were two percent minority representation at the end of the first year, four percent at the end of the second, and so on up to ten percent at the end of the fifth year. Population projections suggested that the minority share of total population in the region would approximate this ten percent figure in 1975.

During the first year of this program, known as the Boston Plan, relationships rapidly deteriorated between the union and contractor representatives on the one hand, and the minority community representatives on the other. The U. S. Department of Labor, which funded the Boston Plan and which alone had the power to impose any sanctions for non-compliance, reported last summer that the first year Boston Plan targets had been substantially achieved. But there was widespread criticism in the minority community of the monitoring techniques employed.

The Department of Labor decided last summer that the state of relationships among the three parties necessitated a change in the original Boston Plan. Therefore, it withheld

second year funding while a revised Boston Plan was negotiated. The new program, known as The Boston Area Construction Program (Boston Plan II) commenced operation in January 1972.

Boston Plan II retains the original Boston Plan minority employment targets. It is a two-party plan, however, involving only contractor and labor union representatives. Boston Plan II was negotiated without any participation by state or local public officials, or by minority community representatives. It has been endorsed and funded by the U. S. Department of Labor.

The parties to Boston Plan II agree that its first year (1972) target must be the second year target of the original Boston Plan, four percent. Minority community representatives point out, however, that it is *now* a full two years since the original agreement, and that, (given attrition since last summer) not even the first year target is a current reality. Minority representatives have also emphasized the resentment inspired in communities with heavy minority concentrations at the sight of public works being constructed with few or no minority workers. The Administration has judged that these views merit recognition in the state's minority employment policy.

The Administration judges, moreover, that there are three important sources of uncertainty about the future effectiveness of Boston Plan II as a mechanism for integrating the construction labor force. These involve the Boston Plan II provisions for statistical measurement, access to the data base, and enforcement.

The annual goals of Boston Plan II are couched in terms of numerical objectives on unionized construction jobs. There is no provision for collection of reliable data, how-

ever, on the actual number of days or hours per year that those placed are employed, or for comparison of these figures with those for non-minority members of the labor force. The Administration believes that the majority of unions and contractors may act responsibly to ensure that referral, employment, job assignment, and seasonal layoff proceed in a non-discriminatory manner, but unless the success of the plan is measured in terms of man-days or man-hours actually worked, Boston Plan II will lack credibility with both the Administration and the minority community. There is a serious national problem of statistical inadequacy with respect to time actually worked in the field of construction, but the Administration believes that an adequate reporting system can be piggybacked onto existing data collection mechanisms.

Commonwealth access to the information required for an evaluation of Boston Plan success is another problem. MCAD access to the Boston Plan II records and reports, plus the opportunity to conduct on-site spot checks of data reliability, is a minimum requirement if the Administration is to have assurance that performance is adequate. The Commonwealth experience with Boston Plan I, unfortunately, was that absent specific written agreement between the Boston Plan parties and the Commonwealth, such cooperation could not be realized.

Enforcement is the third aspect of Boston Plan II with respect to which the Administration feels that assurances to date have been inadequate. The Office of Federal Contract Compliance, the unit within the U. S. Department of Labor whose director alone has been charged with the power to impose sanctions, has recently been disbanded. No assurances have been received, moreover, that strong Federal enforcement by a successor unit is contemplated, or that

enforcement will in any way be responsive to state government policies and findings. Thus, the Administration judges that it must provide for enforcement of affirmative action with respect to state work via its own agencies and contractual provisions.

* * * * * * * * * * *

The policies and procedures delineated below shall remain in force through the end of May 1974, at which point the data required for an evaluation of Boston Plan II through its first two years should be fully available. During the interim, the Administration shall constantly monitor the progress of Boston Plan II.

At any time during this period, as and if the Administration finds that specific trades are failing to meet their Boston Plan II commitments, or are failing to provide adequate information to permit a reliable judgment of compliance to be made, job-by-job minority requirements for these trades will be applied on all new state contracts let throughout the Boston Plan region.

Commencing immediately, however, job-by-job minority requirements shall become a part of all new state contracts let within the specific communities in the region that contain substantial minority residential concentrations. These communities are Roxbury, Dorchester, and South Boston. The minorities to which the policy refers include Blacks, Orientals, Puerto Ricans and American Indians.

On state projects within these communities, the contracting agency shall require of the general contractor that minorities perform a specified percentage of man-hours worked, trade by trade, on the project. The general contractor shall contractually require identical commitments

from each subcontractor. On contracts let before May 30, 1973, the ratio required shall be twenty percent. On contracts let from June 1, 1973 through May 30, 1974, the ratio required shall be thirty percent.

Prior contract language has called for a good faith effort on the part of the contractor to achieve minority employment goals. The language henceforth shall require simply that the goal be achieved; if it is not, the contract places upon the contractor the burden of proving that he nevertheless did everything within his power to achieve the goal.

Referrals may come from union referral halls, through the Boston Plan, or from other sources. To the extent that the Boston Plan provides minority workers, these shall be counted toward Boston Plan goals. The Commonwealth program shall not have the effect of increasing these goals, but rather of altering the geographic distribution of placements. A substantial problem still exists in provision of trainees. If union sources and the Boston Plan make available trainees in sufficient quantity, well and good. If, however, trainees are not forthcoming, the state shall take additional steps to ensure that access to the industry by individuals ineligible for apprenticeship programs by reason of age or formal education is not impeded.

The contractor shall henceforth take steps to involve minority contractors in subcontracts which are negotiated by him. In addition, the Administration is readying a training program on the complexities of state bidding for minority contractors. Finally, a preference in hiring for citizens of the Commonwealth and veterans shall now become a part of the equal employment opportunity clause, subject to monitoring and enforcement by the Liaison Committee and MCAD.

The primary responsibility for monitoring compliance shall rest with the Massachusetts Commission Against Discrimination (MCAD). For each project within the minority community, however, a liaison committee will be established, consisting of both minority community and public agency representatives. The contractor shall consult with the Liaison Committee on all matters related to recruitment, referral, employment and training, and the Liaison Committee shall assist the MCAD in monitoring contractor compliance with the minority employment contract provisions. The contract language provides that the contractor shall furnish the liaison committee with specified data so that it may be effective. For the Boston State College project, the Liaison Committee shall consist of one representative each from the Bureau of Building Construction, MCAD, Boston State College, the Boston State Coalition, the Black Students' Association of Boston State College, and the Contractors' Association of Boston, which represents minority contractors.

When the contracting agency, MCAD, or the liaison committee believes that the general contractor or any subcontractor is in non-compliance, MCAD shall conduct an investigation. Upon a preliminary finding of non-compliance, MCAD shall require corrective action by the contractor. If the contractor still fails to comply, MCAD shall recommend the imposition of sanctions by the contracting agency. The sanctions may include recovery from the contractor of monetary damages, withholding of payments due the contractor, cancellations of the contract, or barring the contractor for a period from bidding on state work.

The policy and procedures here summarized shall remain in force through the end of May 1974. If at that time the Administration finds that Boston Plan II has achieved its

1973 target of six percent minority representation in each trade, and that it appears to be well on its way toward achievement of the 1974 target, the possibility of dropping job-by-job percentage requirements from subsequent state construction contracts will receive the most serious consideration. Conversely, if the Boston Plan goals are not being met, or the data made available for evaluation are inadequate to permit a reliable finding, the Administration will extend its program of job-by-job minority employment requirements.

The minority employment policy announced today applies to the Boston Plan region. As administrative experience is acquired in the coming months, however, it is anticipated that similar policies will be developed for the other urban areas of the Commonwealth with substantial minority populations.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1974, the Petition for a Writ of Certiorari was served upon the respondents by mailing three copies thereof, certified mail, postage prepaid, return receipt requested, to each of the following attorneys:

Dennis L. Ditelberg, Esq., Ass't Att'y General, State House, Room 71A, Boston, Massachusetts; Gershon M. Ratner, Esq., Boston Legal Assistance Project, 84 State Street, Boston, Massachusetts; Robert City, Esq., 15 Broad Street, Boston, Massachusetts; Benjamin Jones, Esq., Boston Legal Assistance Project, 474 Blue Hill Avenue, Roxbury, Massachusetts.

I further certify that all parties required to be served have been served.

/s/ JAMES J. O'LEARY

JAMES J. O'LEARY
82 Devonshire Street
Boston, Massachusetts 02109
Attorney for Petitioners

LIBRARY
SUPREME COURT, U. S.

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1324

ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS, INC., et al.,

PETITIONERS,

v.

ALAN ALTSHULER, et al.,

RESPONDENTS.

TO THE UNITED STATES COURT OF APPEALS ON PETITION FOR A WRIT OF CERTIORARI FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

ROBERT H. QUINN
Attorney General
DENNIS L. DITELBERG
Assistant Attorney General
71A State House
Boston, Massachusetts 02133
Attorneys for Respondents
Alan Altshuler and Walter J. Poitrast
GERSHON M. RATNER, *Esquire*
Boston Legal Assistance Project
27 School Street
Boston, Massachusetts 02108
Attorney for Intervenor
Michael Williams
ROBERT CITY, *Esquire*
15 Broad Street
Boston, Massachuestts 02109
Attorney for Intervenor
United Community Construction Workers

Rinehart Print. Inc., Boston, Mass. — Law Printers

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions	2
Statement of the Case	2
Reasons for Denying the Writ	
I. The Decision Of The Court Of Appeals Is Fully Supported By, And Consistent With, The Decisions Of This Court And Other Federal Courts Nationwide.	3
A. The Fourteenth Amendment's Equal Protection Clause permits the Commonwealth of Massachusetts to institute an affirmative action plan for hiring qualified minority workers on state funded construction with federal assistance in order to remedy the effects of a proven history of racial discrimination against minorities in such employment.	3
B. Requiring contractors to bear the burden of showing that they have taken "every possible measure" to reach the 20% minority hiring goal before excusing contractors from reaching the goal is reasonably related to remedying past racial discrimination and does not violate the Fourteenth Amendment's Due Process Clause.	6
C. Executive Order No. 11246 does not "preempt" the state's § 1B provisions nor does § 1B "conflict" with the Executive Order under the Supremacy Clause, Article VI, of the United States Constitution.	8

Page

II. The Decision Below Is Not in Conflict With Decisions in Any Other Circuit. 11

Conclusion 12

Appendix

Affidavit of Alan Altshuler 13

TABLE OF CITATIONS

Cases

Colorado Anti-Discrimination Commission v. *Continental Air Lines*, 372 U.S. 207 (1971) 9

Florida Lime and Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 8, 10

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 4

Louisiana v. *United States*, 380 U.S. 145 (1965) 4

Mancari v. *Morton*, 5 CCH Fair Empl. Prac. Cases 1321 (D. N. M. 1973), *prob. juris. noted.* 42 U.S.L.W. 3405 (U.S. Jan. 14, 1974) 11

Swann v. *Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971) 4

United States v. *Wood, Wire & Metal Lathers International Union, Local Union No. 46*, 471 F.2d 408 (1973), *cert. den.*, 41 U.S.L.W. 3645 (U.S. June 12, 1973) 5

Constitutional Provisions

United States Constitution,

Article VI, Clause 3 ..... 2, 8

Tenth Amendment 4

Fourteenth Amendment 2, 3, 5, 6

Miscellaneous

6 Moore's *Federal Practice*, para. 56.11[3] (1966) .. 7

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1324

ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS, INC., et al.,

PETITIONERS,

v.

ALAN ALTSHULER, et al.,

RESPONDENTS.

BRIEF OF RESPONDENTS ALAN ALTSHULER AND WALTER J. POITRAST AND INTERVENORS UNITED COMMUNITY CONSTRUCTION WORKERS AND MICHAEL WILLIAMS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals is not yet officially reported but appears in Petitioners' Appendix B (Pet. A-41). The opinion of the District Court is reported at 361 F. Supp. 1293 (Pet. A-1).

Jurisdiction

The judgment of the Court of Appeals (Pet. B-23) was entered on November 30, 1973. The Petition for Writ

of Certiorari was filed on February 28, 1974 and received by the Respondents on March 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

In order to remedy present "serious" racial imbalance in Boston's construction trades resulting in large part from undisputed past racial discrimination, particularly state funded projects, is it constitutionally permissible for the Commonwealth of Massachusetts in contracting for construction of a federally assisted state project in a 40% minority community in the Boston area to incorporate in the contract, supplementary to federal bid conditions, its own affirmative action bid conditions (§ 1B) which require contractors to take "every possible measure" to maintain from available sources a qualified minority work force on the site based on a ratio of at least 20% minority workers in each job category, where the burden of proving compliance is with the contractors subject to their right to notice and full opportunity to contest allegations of non-compliance and imposition of sanctions?

Constitutional Provisions

The constitutional provisions involved in this case are the Supremacy clause of Article VI and the Equal Protection and Due Process clauses of Amendment XIV, § 1 of the United States Constitution, the text of which appears in page 3 of the Petition.

Statement of the Case

An excellent statement of the facts, background and proceedings of this case is set out in the opinion of the

Court of Appeals which appears in Petitioners' Appendix B, pages B-1 - 8; B-19 - 20. The findings of fact by the District Court judge appear in Petitioners' Appendix B, pages A-5 - 12.

Reasons for Denying the Writ

Although Respondents concede the importance of this case in furthering equal employment opportunity for qualified minority workers in Boston's construction trades, there are no compelling reasons for this Court to "settle" questions of "federal law" decided by the Court of Appeals. Moreover, the decision below is not in conflict with decisions in any other circuit. In essence, the Court of Appeals and District Court decisions are based on careful findings of fact and thoughtful and balanced analyses of law consonant with decisions of this Court and other federal courts nationwide.

I. THE DECISION OF THE COURT OF APPEALS IS FULLY SUPPORTED BY, AND CONSISTENT WITH, THE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS NATIONWIDE.

A. *The Fourteenth Amendment's Equal Protection clause permits the Commonwealth of Massachusetts to institute an affirmative action plan for hiring qualified minority workers on state funded construction with federal assistance in order to remedy the effects of a proven history of racial discrimination against minorities in such employment.*

This Court has recognized that the Constitution permits states to consider race as a factor in making public policy if necessary to remedy prior illegal racial discrimination.

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16-17 (1971). Further, this Court has recognized that state agencies have discretionary powers to remedy racial discrimination that are at least as broad, if not broader, than those of federal courts in equity. *Id.*, 15-17. *See* Amendment X, United States Constitution. As with federal courts, the nature of appropriate remedies should be limited only by the nature of the illegal conduct to be corrected. *See Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). Any remedial steps that are reasonably related to rectifying a prior illegal condition are to be upheld. *See Swann, supra* at 31; *cf. Katzenbach* v. *Morgan*, 384 U.S. 641, 648-56 (1966).

Here, the record below proved, and the courts below found, that there had been a history of racial discrimination in effect in the construction trades in Boston. (Pet. A-9 - 11; B-16, 19). Such racial discrimination existed on state funded construction as well as construction funded by other sources. (Appendix, 13-14, 17).

The Commonwealth of Massachusetts instituted its Section 1B plan for minority hiring to rectify the present effects of past racial discrimination on state funded construction and prevent itself from being implicated in continued racial discrimination in effect on projects which the state created, funded, supervised and controlled. (Appendix, 17). The plan applies only to state construction projects located in those minority sections of Boston having a 40% average minority population. (Appendix, 16-17; Pet. B-16). As the courts below held, Section 1B requires contractors to hire only "competent" or "qualified" minority workers. (Pet. A-27; B-2, 17).

Section 1B requires contractors to "maintain . . . a not less than twenty percent ratio of minority employees' man

hours to total employees' man hours in each job category.", if such workers are available. (Pet. A-34). If a sufficient number of qualified workers are not accessible, contractors need only show that they have taken "every possible measure" presently available to find such workers, and they will be excused from meeting the 20% requirement. (Pet. A-39). And as the Court of Appeals held,

> In the present instance, there is no question that a compelling need exists to remedy serious racial imbalance in the construction trades, particularly in Roxbury, Dorchester, and South End, where minorities constitute approximately forty percent of the population, and yet only about four percent of the membership of buildings trade unions, and where there has been a long history of racial discrimination in those unions. (Pet. B-16).

Since the state created the provisions of Section 1B to remedy a history of prior racial discrimination in state funded construction, the 20% minority hiring racial preference does not violate equal protection. In upholding this plan, the Court of Appeals relied on numerous other decisions throughout the country which have recognized that similar racial preferences for minority groups to rectify past racial discrimination in employment are completely valid under the Equal Protection clause. (Pet. B-14). As the Second Circuit recently held in *United States* v. *Wood, Wire & Metal Lathers Industrial Union, Local Union No. 46*, 471 F.2d 408, 413 (1973), *cert. den.*, 41 U.S.L.W. 3645 (U.S. June 12, 1973), "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not.'

B. *Requiring contractors to bear the burden of showing that they have taken "every possible measure" to reach the 20% minority hiring goal before excusing contractors from reaching the goal is reasonably related to remedying past racial discrimination and does not violate the Fourteenth Amendment's Due Process clause.*

The "every possible measure" requirement is an integral part of the Commonwealth's affirmative action plan and, consistent with decisions of this Court, must be sustained if it is reasonably related to the goal of remedying the present effects of past racial discrimination. (Pet. B-16, 17). As the Court of Appeals said below, "Even where a long history of discrimination and continuing racial imbalance compels the remedial use of racial criteria, however, the means chosen to implement the compelling interest should be reasonably related to the desired end." (Pet. B-16). On this point, Respondent Secretary Altshuler, who promulgated the provisions, stated his justification of the reasonableness of the "every possible measure" standard in an uncontested affidavit in the District Court below:

> We established that contractors must either achieve the 20% goal or show that they had taken "every possible measure" to do so because we wanted to be sure that contractors took their 1B responsibility seriously. We believe contractors could meet this standard and be excused from full attainment of the 20% goal in all legitimate cases by showing what efforts they made to each 20%, why such efforts failed, and why other reasonable efforts were not "possible".[1] Further, we believe that a lesser standard

[1] The Commonwealth has already made clear in this affidavit that contractors are only required to take every possible "reasonable"

might be unenforceable in practice. Whenever a contractor shows that he tried "every possible measure" to reach the 20% goal and failed, he will be excused from reaching that goal. (Appendix, 18).

Further, under Section 1B, contractors are provided with notice and a full opportunity to contest allegations that they have failed to take "every possible measure" to reach the 20% goal before any sanctions can be imposed. (Pet. B-20; Appendix, 20). The sanctions process thus fully complies with procedural Due Process (Pet. A-12, A-28; B-19-21).

Finally, although petitioners pontificate that because of the "every possible measure" standard contractors "will have to prefer a 'possibly qualified' minority applicant over a fully qualified white worker whenever a quota has not been filled;" that "less-than-fully qualified minority workers will be hired on pragmatic grounds"; and that contractors "will conclude that deviations from the quota represents a greater threat to [their] livelihood than the hiring of workers of dubious competence", (Pet. 12) the record contains not one iota of evidence to support this conjecture. Whether the "every possible measure" standard had already forced contractors to hire unqualified workers on the Boston State College project or whether it would force contractors to hire such unqualified workers on future projects were questions of fact which could only be established by evidence presented to the court. Since petitioners failed to present any such evidence, all their unsupported assertions as to hiring "less-

---

effort, not every effort that might be physically possible, and the Commonwealth is bound by this representation, as a matter of law. *See* 6 Moore's *Federal Practice*, para. 56-11[3] (1966).

than-qualified" or "possibly qualified" workers should be disregarded.[2]

C. *Executive Order No. 11246 does not "preempt" the state's § 1B provisions nor does § 1B "conflict" with the Executive Order under the Supremacy clause, Article VI, of the United States Constitution.*

This Court has established that

> federal regulations of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persausive reasons—either that the nature of the regulatd subjct matter permits no other conclusion, or that the Congress has unmistakably so ordained. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963).

Nothing in the "nature" of remedying racial discrimination on state funded construction projects (although federally assisted) inherently requires that this be a subject for "exclusive federal regulation." *Florida Lime, supra* at 143.

Indeed, a state's determination of what steps it believes are necessary to satisfy its obligations to avoid racial discrimination under the Equal Protection clause in employment on state funded projects is the kind of subject traditionally appropriate for states to resolve by them-

[2] Petitioners' assertions that the Court of Appeals held that Section 1B "*will* likely result in the hiring of unqualified minority workers" (Pet. 9-10) and that it "would be likely to cause a contractor to hire unqualified minority applicants" (Pet. 12-13) is not quite true. The Court simply stated that "in principle" Section 1B "*might* create the likelihood that unqualified workers would be hired." [Emphasis added] (Pet. B-18).

selves. *Cf. Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 373 U.S. 714, 721 (1963). And Massachusetts has demonstrated that it has an intense state interest in ensuring that there is an effective affirmative action plan for hiring on state funded construction projects. (Pet. A-14-15; A-1-10).

Nor has Congress "unmistakably . . . ordained" that it intended Executive Order 11246 to "preempt" the field of eliminating racial discrimination in hiring on state funded construction projects. Petitioners have not cited any language explicitly indicating that Congress (or the Executive) intended the Order to preempt the field. Indeed, as the Court of Appeals noted:

> The Secretary of Labor has stated, as *amicus curiae*, that the federal program is *not* meant to preempt state programs such as the Commonwealth's § 1B. And Congressional policy in this area, as expressed in Title VII of the Civil Rights Act of 1964, the statute most closely analogous to the President's Executive Order, is clearly one of encouraging state cooperation and initiative in remedying racial discrimination. Title VII, 42 U.S.C., § 2000h-4 expressly disclaims any intent to preempt state action. [Emphasis added] (Pet. B-10).
>
> *See also Colorado Anti-Discrimination Commission, supra*, at 722-725.

Nor this there any "conflict" between Section 1B and the federal Boston Plan, either in purposes or in practice. As the Court of Appeals stated, "Clearly, the broad purposes which lay behind the federal Boston Plan and the Commonwealth's § 1B are congruent. . . . Both plans envisage minority hiring goals as a means of achieving equal opportunity." (Pet. B-9).

In practice, the federal and state plans are compatible with each other and do not conflict. Both courts below recognized that the federal plan merely established minimum goals.

This Court has recognized that even if private individuals' activities have been certified to be in "compliance with minimum federal standards" states are not barred from imposing "more demanding state regulations" as long as individuals are able to comply with both sets of regulations. *See Florida Lime, supra* at 141-143. The test for "actual conflict" is whether "dual compliance," i.e. compliance with both the state and federal law, is "imposible." *Florida Lime, supra* at 143.

Here there is no evidence whatsoever in the record that "dual compliance" is "impossible."[3] To the contrary, all the relevant evidence in the record attests that contractors could in fact fully comply with all provisions of the federal and state plans at the same time and the District Court so found. (Pet. A-18).

And as the Court of Appeals stated:

> While we acknowledge that § 1B may be more demanding than the Boston Plan, and may well involve higher administrative costs, there is no reason to suppose that contractors could not comply with both at the same time. By complying with § 1B's minority hiring goals on projects funded by both the

[3] See Pet. B-10. All that petitioners have shown is that the § 1B provisions are "different" from the federal plan, but difference alone is not enough. As this Court said in *Florida Lime, supra* at 141: "That the California statute and the federal marketing orders embody different maturity tests is clear. However, this poses, rather than disposes, of the problem before us." Petitioners' assertion that the Section 1B "undercuts a vital federal interest" (Pet. 17) and that Section 1B "will so impair the operation of the Boston Plan as to render it a nullity" (Pet. 21) are unadulterated speculations completely unsupported by any evidence in the record and should be disregarded.

state and the federal government, contractors would also comply with the Boston Plan's goals. (Pet. B-10).

II. The Decision Below Is Not in Conflict With Decisions in Any Other Circuit.

Petitioners have not cited a single precedent to dispute the ruling below that a governmental employment preference for racial minorities created to remedy the current effect of historic racial discrimination against such minorities does not violate constitutional "equal protection."[4] Respondents are unable to discover any holdings disputing this widely accepted principle, nor have petitioners evidently been able to find any.

The sole case which petitioners cite in this regard for the proposition that it "conflicts in principle with the decision in this case",[5] *Mancari* v. *Morton*, 5 CCH Employment Practices Decisions p. 7930, ¶8643 (D.N.M. 1973), *prob. juris. noted*, 42 U.S.C.W. 3405 (U.S. Jan. 14, 1974), in fact does not conflict at all. In *Mancari*, there was no evidence that the Indian preference policy was created to remedy historic discrimination against Indians in jobs at the Bureau of Indian Affairs. As the three-judge court held, "The defendants had the burden of coming forward with evidence of an important governmental objective [to justify the Indian preference policy] but put in no evidence directed to this matter." at p. 7934. Since the preference policy appeared to be totally unjustified by any public purpose, the Court quite reasonably suggested the policy might be unconstitutional.[6]

Petitioners do not even purport to cite any cases which

---

[4] See Pet. 10-16.

[5] Pet. 15.

[6] The court's language in this regard is *dictum* since the court focused on the statutory issue and never reached the constitutional issue.

challenge the legal principles applied by the Court of Appeals below in determining whether there was federal preemption or conflict. (Pet. 17-21). In fact, in deciding these questions, the Court of Appeals relied directly on leading decisions of this Court. (Pet. B-8, 11).

In sum, no conflict exists with either the underlying legal principles governing this case, or the decisions in the other federal courts applying such principles.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT H. QUINN
Attorney General

DENNIS L. DITELBERG
Assistant Attorney General
71A State House
Boston, Massachusetts 02133
Attorneys for Respondents
Alan Altshuler and Walter J. Poitrast

GERSHON M. RATNER, Esquire
Boston Legal Assistance Project
27 School Street
Boston, Massachusetts 02108
Attorney for Intervenor
Michael Williams

ROBERT CITY, Esquire
15 Broad Street
Boston, Massachusetts 02109
Attorney for Intervenor
United Community Construction Workers

March 28, 1974

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Civil Action No. 72-3410-F

ASSOCIATED GENERAL CONTRACTORS
OF MASSACHUSETTS, INC., ET AL.,
PLAINTIFFS,
v.
ALAN ALTSHULER, ET AL.,
DEFENDANTS.

AFFIDAVIT OF ALAN ALTSHULER

I, Alan Altshuler, being duly sworn, hereby depose and say:

1. I am the Secretary of the Executive Office of Transportation and Construction of the Commonwealth of Massachusetts. I was duly appointed to that position by the Governor of the Commonwealth of Massachusetts pursuant to M.G.L.A. c. 6A §3 on June 25, 1971.

2. As Secretary, I am legally responsible for the "exercise of all powers and the performance of all duties assigned by law" to the Bureau of Building Construction within the Executive Office of Transportation and Construction. M.G.L.A. c. 6A §20.

3. In my capacity as Secretary of the Executive Office of Transportation and Construction, I promulgated the I-B contract provisions which plaintiffs challenge in the above-captioned case and am familiar with those provisions.

4. I have read the *Complaint* filed in the above-captioned case and am familiar with the contents thereof.

5. On March 31, 1972, Governor Francis W. Sargent

directed me to review whether reliance by the Commonwealth on the federal Boston Plan for state funded construction projects in the Boston Plan area would adequately remedy the effects of past racial discrimination on such state funded projects or whether the Commonwealth should develop an independent plan to achieve this objective. The Governor specifically noted his dissatisfaction with the fact that the federal Boston Plan had been negotiated without the involvement of state officials or the minority community. The matter of remedying the effects of past racial discrimination and achieving equal employment opportunity on state funded construction projects is a matter of intense concern and interest to the Commonwealth.

6. After receiving the Governor's directive, I requested my Assistant Secretary William Najam to review with me the history of hiring of minorities in the construction industry in the Boston area. Over the course of the following weeks we undertook an extensive review of this history. I personally attended many of the meetings referred to in *Further Affidavit of William J. Najam, Jr.*, paragraph 31, and worked closely with Assistant Secretary Najam on this review. He reported to me periodically the contents of meetings I was unable to attend and the results of the investigations he undertook without my direct participation. I have read the affidavit entitled *Further Affidavit of William J. Najam, Jr.* The review Assistant Secretary Najam describes in that affidavit is an accurate statement of the review we undertook.

7. As a result of my direct participation in Assistant Secretary's Najam's review and information he told me based on that review, I learned that:

a) Blacks, Puerto Ricans, Orientals and American Indians constituted only 1-3% at most of the skilled construction work force in the City of Bos-

ton although they constituted approximately 20% of the population of the City and approximately 39% of the overall population of Roxbury, Dorchester and South End;

b) Such severe underrepresentation of minorities in construction jobs had gone on for many years;

c) Virtually all contractors who had done major public works construction for the Commonwealth in the Boston Plan area and would be expected to do such work in the foreseeable future based on their size and experience hired their construction workers exclusively from established building trade unions;

d) That these unions, other than the laborers' unions, had virtually no minority members;

e) That numerous trade union practices resulted in systematic exclusion of minorities from building trade union membership in the Boston area;

f) Unless the Commonwealth took affirmative action to substantially increase the number of minority workers on state funded projects in Roxbury, Dorchester and South End, minority workers would constitute at most only a nominal percentage of all skilled workers on such jobs although minorities constituted almost 40% of the population of those areas;

g) The federal Boston Plan II, in effect for 1971-72 and renewable thereafter, wholly excluded minority community representatives as parties and had no mechanism for guaranteeing minority input, modification or review of the Plan;

h) The federal Plan's sole hiring goals consisted of hiring a number of minority workers on constructions jobs during a year but made no provision that such persons work at least any particular

minimum numbers of days or hours or earn at least any particular minimum income during that year;

i) The federal Plan's hiring goal for the year could be satisfied even if the minority workers were unemployed virtually the entire year and made virtually no income;

j) The federal Plan's numerical goals were allegedly set for each trade to enable minorities to constitute approximately 4% of each trade in 1971-72 in the greater Boston area covered by the Plan and an additional 2% for each of the three succeeding years;

k) The federal Plan was to have added approximately 4% of the work force, or 700 workers, by the end of its second year in July, 1972. However, as of May, 1972 the Plan had added only approximately 350 workers. Moreover, the administrators of the Plan could not determine accurately how many of those 350 workers were still working in the construction industry at that time; the Director of the Plan estimated that only approximately 200 of the original 350 workers were still working by the Spring of 1972;

l) The contractor and union association parties to the federal Plan and the federal government itself refused to make available official statistics of the Plan's operations to the Commonwealth notwithstanding repeated requests by the Commonwealth for such information.

8. Based upon all the information I gathered from Assistant Secretary Najam and on my own, including but not limited to that referred to in paragraphs 5, 6, and 7 above, I concluded that the Executive Office of Transportation and Construction should promulgate its

own affirmative action provisions for hiring minority workers for state funded construction projects in Roxbury, Dorchester and South End. At that time we also urged the signatories to the federal Boston Plan to fully comply with the federal Plan's provisions, and, whenever possible, to apply minorities recruited through the federal Boston Plan to satisfy the I-B goals.

9. I instituted those provisions contained in Section I-B of the contract to remedy the present effects of past racial discrimination in construction trades on state funded projects in the Boston area minority community, and thereby avoid having the Commonwealth participate in perpetuating racial discrimination in effect in state projects which the Commonwealth created, funded, supervised and controlled.

10. In I-B, we established a goal of 20% minority man-hours for a number of reasons. We knew that minorities constituted approximately 39% of Roxbury, Dorchester and South End and therefore we had to establish a substantial percentage goal to reasonably remedy past exclusion from jobs for that community. We knew that if we established a 20% goal it would in fact add only approximately 30-40 new minority workers per year to state projects and we believed any fewer number would be meaningless. We wanted to establish a goal that could be reached based on the current availability of minority journeymen and trainees; based on our investigations we believed 20% could be reached.

We required that the goal be man-hours rather than simply men placed in a job to ensure that minority workers would be hired for substantial periods of time. We established a liaison committee including minority members so that representatives of the minority community which would be so heavily affected by I-B could participate in its administration and operation.

We required record keeping of wages and hours and Commonwealth access to such so that the Commonwealth could effectively determine whether the I-B provisions were being complied with and oversee its enforcement. We specified that multiple sources of referral, including minority labor organizations, would be available to contractors so that minority hiring goals would not be frustrated at the threshold by traditional exclusive contractor reliance on trade unions which have almost no minority members. However, we left entirely to the contractor the determination of which minority applicants were qualified and which he wished to hire.

We established that contractors must either achieve the 20% goal or show that they had taken "every possible measure" to do so because we wanted to be sure that contractors took their I-B responsibility seriously. We believe contractors could meet this standard and be excused from full attainment of the 20% goal in all legitimate cases by showing what efforts they made to reach 20%, why such efforts failed, and why other reasonable efforts were not "possible." Further, we believe that a lesser standard might be unenforceable in practice. Whenever a contractor shows that he tried "every possible measure" to reach the 20% goal and failed, he will be excused from reaching that goal.

11. The Commonwealth of Massachusetts will supervise, control and be fully responsible for all construction projects to which the state I-B contract provision challenged in this action will apply in that it will:

a) Provide substantial state funding for such projects;

b) Will own the land on which the projects are to be built and will own the buildings resulting from the construction;

c) Will closely supervise the design and construction of the projects;

d) Will maintain the facilities at its expense once they are built;
e) Will regulate the use of the facilities;
f) Such facilities will serve a public function;
g) Will make the facilities exempt from all state and local taxes because of their public use, function and ownership.

12. Having read the plaintiffs' verified *Complaint* in this action, I deny certain of the allegations and implications contained therein. Specifically, I state that:

a) I-B does not require contractors to hire minority workers regardless of their qualifications; to the contrary, the Boston State contract includes, and all future contracts in which the I-B provisions will be contained will include, a provision that requires contractors to hire only "competent" workers. (See Contract §V-3). The Commonwealth's interpretation of these provisions of the contract is that they require contractors to hire only "competent" workers in all situations including workers hired under all I-B provisions and that "competent" is synonymous with "qualified." I will ensure that the "competent" worker requirement is enforced at all times.
b) The provisions of I-B are fully consistent with federal law in all respects including the 20% man-hour goal, qualification of workers, standard for excuse from achieving 20%, and contractor's burden to show compliance not "possible." These standards may be different from, and in some respects, higher than the standards contained in the federal plan but they are wholly consistent. A single contractor can in fact comply with the provisions of both the federal and state plans at the same time; there is thus no conflict between them.

c) I-B does not allow sanctions to be imposed against a contractor for non-compliance prior to notice and hearing. To the contrary, I-B provides and I will ensure in all cases, that no sanctions are taken against any contractor prior to notice and hearing as set forth in M.G.L.A. c. 30A § 10, 11. See I-B addendum 2.

d) Although I-B may require simultaneous job referrals in certain instances, each contractor retains the right to hire whichever workers he desires.

e) I do not necessarily "intend" to require I-B provisions in other high minority areas of the Commonwealth. Prior to instituting such program in any other area, I would require a full evaluation of local conditions in such area. As of right now, I do not intend to institute the I-B provisions in any other area of the Commonwealth.

f) No contractor will be at a "serious economic disadvantage" *vis a vis* any other contractor if he bids on a state contract with I-B provisions because all bidders on the contract will be in the identical position as to I-B. No contractor will suffer "irreparable harm" by bidding on a I-B contract, except perhaps, such technical harm as he may suffer in having to be bound by provisions he may believe are not legal.

I, Alan Altshuler, being duly sworn, hereby depose and say that I have read the above affidavit and all statements made therein are true and correct based on my personal knowledge.

(s) ALAN ALTSHULER
ALAN ALTSHULER

Signed and sworn before me this 11th day of January, 1973.

(s) LEAH JANSIZIAN
Notary Public
My Commission Expires:
March 5, 1976